KSM Industries, Inc. *and* United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union Local 2-779, AFL–CIO. Cases 30–CA–13762, 30–CA–14008, and 30–CA–14101

March 26, 2009

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On September 27, 2007, Administrative Law Judge David I. Goldman issued the attached supplemental decision. The General Counsel, the Respondent, and the Union filed exceptions, supporting briefs, and answering briefs, and the Respondent filed a reply brief.

The National Labor Relations Board[1] has considered the supplemental decision and the record in light of the exceptions[2] and briefs, and has decided to affirm the judge's rulings, findings,[3] and conclusions as modified below and to adopt his recommended Order as modified and set forth in full below.

The issues in this compliance-stage proceeding center on backpay owed to unfair labor practice strikers who were unlawfully denied recall by the Respondent or whose recall was unlawfully delayed,[4] including whether certain strikers abandoned their employment with the Respondent,[5] the appropriateness of the General Counsel's method for determining order of recall and, accordingly, starting dates for individual strikers' accrual of backpay, and the sufficiency of strikers' efforts to mitigate backpay.[6] We agree with the judge's decision in all respects for the reasons he stated, except as explained herein.

1. In affirming the judge's finding that striker Jesus Rodriguez did not abandon employment, we rely on *Alaska Pulp Corp.*,[7] and the following analysis. After receiving the strikers' unconditional offer to return to

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[2] The Respondent filed bare, unbriefed exceptions to the judge's findings that Robert Hanrahan, Allen Curtis, and Richard Kuhlenbeck did not abandon their struck jobs, and that Brandon Hottenstein's and Gordon Sabel's discharges from interim employment did not toll their backpay. In the absence of any argument as to why these findings should be overturned, we find that the Respondent's foregoing exceptions should be disregarded. See *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005), enfd. 456 F.3d 265 (1st Cir. 2006).

[3] The Respondent and the Union have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] See *KSM Industries*, 336 NLRB 133 (2001), motion for reconsideration granted in part on other grounds 337 NLRB 987 (2002).

[5] We reject the Respondent's contentions that the judge's findings concerning strikers who resigned from KSM to obtain their 401(k) savings are flawed in light of the analyses articulated in *BP Amoco–Chocolate Bayou*, 351 NLRB 614 (2007), and *Toering Electric Co.*, 351 NLRB 225 (2007), which issued after his decision. Both cases are wholly inapplicable. In *BP Amoco*, the issue was whether discharged employees who signed releases in exchange for enhanced severance packages waived the right to file unfair labor practice charges or have charges filed on their behalf. Here, the issue is whether strikers who resigned because it was the only way they could obtain payouts from their 401(k) accounts unequivocally intended permanently to sever the employment relationship. Resignation to obtain pension funds does not of itself evidence job abandonment. E.g., *Augusta Bakery Corp.*, 298 NLRB 58, 59 (1990), enfd. 957 F.2d 1467 (7th Cir. 1992). *BP Amoco* has no effect on that holding, which governs here. *Toering Electric* concerns the allocation of burdens of proof where union "salt" job applicants engage in conduct raising the question of whether they are genuinely seeking employment. That decision does not apply to this case.

Because we agree with the judge's findings that strikers Kuhlenbeck, Curtis, Robert Graf, and Douglas Wiedeman did not abandon employment when they resigned in order to withdraw 401(k) funds or receive vacation payouts after the strike ended, we find it unnecessary to pass on the General Counsel's and the Union's exceptions to the judge's failure to find that they were constructively discharged. Similarly, we find it unnecessary to pass on the Union's exception to the judge's failure to find that resigning strikers were treated disparately from nonstrikers who applied for 401(k) withdrawals. We need not pass on these exceptions because additional findings on either issue would not affect the amount of backpay due to any claimant in this case.

We shall modify the supplemental Order with respect to the amount of backpay owed to Curtis, in view of the judge's unchallenged finding that Roger Day abandoned his employment. As a result of that finding, and based on an alternative recall date for Curtis that was pleaded in the amended compliance specification in the event that Day was found to have abandoned employment, we find that Curtis should have been recalled October 10, 1997, not February 13, 1998. Therefore, the Respondent's backpay liability to Curtis is $44,568.11, not $41,702.98. We will modify the judge's Order accordingly.

[6] The Respondent contends that *St. George Warehouse*, 351 NLRB 961 (2007), should guide the Board's analysis in this case of strikers' efforts to mitigate backpay. However, the analytical framework articulated in *St. George Warehouse* applies "[w]hen a respondent raises a job search defense to its backpay liability and produces evidence that there were substantially equivalent jobs in the relevant geographic area for the discriminatee during the backpay period." Id. at 964. The Respondent adduced no such evidence here. Moreover, even if the Respondent had produced the necessary evidence regarding the availability of equivalent jobs, the General Counsel satisfied the burden that would have arisen under *St. George Warehouse,* because the strikers whose efforts to mitigate are in issue appeared at the hearing and the General Counsel elicited testimony from them about their efforts to seek employment.

[7] 326 NLRB 522 (1998), enfd. in part, enfd. and remanded in part, revd. and remanded in part sub nom. *Sever v. NLRB*, 231 F.3d 1156 (9th Cir. 2000).

work, the Respondent mailed each striker a questionnaire asking whether the employee "wish[ed] to be considered for future recall to KSM Industries." Rodriguez marked "no" and signed the questionnaire under a legend that read, "I understand that a 'NO' choice voluntarily terminates my employment with KSM Industries." The Respondent contends that Rodriguez' response terminated his employment.

We disagree. The recall-interest questionnaire was not an offer of reinstatement. In *Alaska Pulp*, the Board stated that it

> has consistently discounted statements, prior to a valid offer of reinstatement, indicating a lack of interest in returning to work. Such statements are not a reliable indicator of an employee's intention to accept reinstatement, because they may reflect only a momentary state of mind and an employee might reconsider if faced with a valid offer.

326 NLRB at 527. We adhere to this rule with respect to Rodriguez, notwithstanding the above-quoted legend on the Respondent's questionnaire. We cannot say that Rodriguez would have responded the same way to an actual reinstatement offer; indeed, he ultimately returned to KSM. Rodriguez' testimony that he answered "no" because he liked his interim employment better at the time does not definitively establish that he would have declined recall had a valid offer been extended to him. It is reasonable to surmise, rather, that Rodriguez preferred a bird in the hand (his interim job) to a bird in the bush (the unoffered option of reinstatement).

We also base our finding as to Rodriguez on policy concerns. When the strikers unconditionally offered to return, the Respondent's legal obligation was to offer them immediate reinstatement or, for strikers permanently replaced before the strike became an unfair labor practice strike, to place them on a preferential hiring list and reinstate them before any other employees are hired or on the departure of their replacements. See *Sunol Valley Golf Club,* 310 NLRB 357, 371 (1993), enfd. sub nom. *Invaldi v. NLRB,* 48 F.3d 444 (9th Cir. 1995). The Respondent did not meet that obligation. To eliminate the cost of that failure by tolling the Respondent's backpay would wrongly tend to encourage employers who might consider similarly evading their legal duties toward returning unfair labor practice strikers.

2. The Respondent excepted to the judge's finding that striker Hans Eusch engaged in a sufficient search for interim employment during his backpay period. We find merit to the exception as it concerns Eusch's mitigation efforts during the last 6 months of 1998. During the third quarter of 1998, Eusch applied for one job, and he did not apply for interim employment at all during the fourth quarter of that year. The Board requires that a discriminatee make a good-faith effort to mitigate loss of income by engaging in a reasonably diligent search for substantially equivalent interim employment. *Moran Printing,* 330 NLRB 376 (1999); *Flannery Motors, Inc.,* 330 NLRB 994, 996 (2000). "'A discriminatee is not due backpay for any period within the backpay period during which it is determined that he or she failed to make a reasonable effort to mitigate.'" *St. George Warehouse,* supra, 351 NLRB at 963 (quoting NLRB Casehandling Manual (Part Three) Compliance, Section 10558.1 (2007)). Eusch's search for work during the second half of 1998, when he applied for only one job, was inconsistent with the foregoing requirements, and we find that he willfully incurred a loss of income. Thus, we shall deny Eusch backpay for the third and fourth quarters of 1998, modifying the judge's Order accordingly.[8]

ORDER

The National Labor Relations Board orders that the Respondent, KSM Industries, Inc., Germantown, Wisconsin, its officers, agents, successors, and assigns, shall make whole the individuals named below by paying them the amounts set forth adjacent to their names, plus interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), accrued to the date of payment, minus tax withholdings required by Federal and State law:

Anthony H. Bannenberg	$14,110.10
Michael R. Bartelt	1,661.31
Dennis M. Benke	6,527.49
Paul W. Bojar	0.00
Jeffrey J. Cadeau	211.85
Darryl G. Campbell	716.25
John F. Casetta	212.16
Orin E. Christensen	1,761.33
Thomas Cooper	6,085.65
Allen M. Curtis	44,568.11
Jason R. Day	0.00
Roger R. Day	5.00
Hans R. Eusch	22,019.52
Raymond J. Fairbanks	0.00
Robert A. Graf	23,393.24
Robert C. Green	457.77
Francisco Guerrero	110.69
Manuel Guerrero	34.50

[8] Eusch's backpay will not be reduced by the retirement benefits claimed for these quarters. See *Alaska Pulp Corp.*, 326 NLRB at 535–536 (1998), and NLRB Casehandling Manual (Part Three) Compliance, Sec. 10544.3. Member Schaumber did not participate in *Alaska Pulp* and does not pass on whether it was correctly decided. He applies it here for institutional reasons.

Paul J. Gutjahr	218.05
Roger J. Gutjahr	0.00
Randy A. Habram	0.00
Robert J. Hanrahan	5,311.44
Randall H. Henning	4,599.01
Michael S. Herbst	0.00
Jerome Hoover	0.00
Brandon Hottenstein	11,127.75
Donald D. Hottenstein	0.00
Ronald L. Hottenstein	0.00
Norbert John Jahn	847.94
Laverne L. Jung	3,944.33
James C. Kollenbroich	7,392.17
Harold S. Koslo	2,110.80
Gaylord E. Krahn	0.00
James Kranz	0.00
Arthur L. Kreis	446.49
David J. Krull	2,598.64
Richard J. Kuhlenbeck	31,841.01
Roger R. Malchow	11,900.63
James W. Malson	16,358.58
Jeffrey J. Mutz	0.00
Charles J. Peltier	2,810.90
William J. Peltier	1,462.67
Alan K. Resch	16,455.91
Mark W. Rettler	1,869.98
Jesus Rodriguez	4,474.02
David W. Rosbeck	342.16
James C. Roskopf	2,534.04
Gordon John Sabel	50,981.66
Jason Sanger	0.00
Anthony D. Schmitt	0.00
Leroy Schmitt Jr.	763.44
David Schneidervin	0.00
Michael A. Servi	4,318.25
Mark A. Snyder	0.00
Roger J. Stern	14,124.03
Williams L. Stiggers	0.00
Gerardo Villarreal	0.00
Lawrence H. Wetzel	13,934.35
Douglas Wiedeman	48,386.66
Michael Lee Zwieg	431.13
Total:	$383,461.11

Christal J. Key, Esq., of St. Louis, Missouri, for the General Counsel.

Kevin J. Kinney, Esq., Timothy C. Kamin, Esq., Emily R. Anderson, Esq. (Krukowski & Costello, S.C.), of Milwaukee, Wisconsin, for the Respondent.

Marianne Goldstein Robbins, Esq., Jill Hartley, Esq. (Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C.), of Milwaukee, Wisconsin, for the Charging Party.

SUPPLEMENTAL DECISION

Statement of the Case

DAVID I. GOLDMAN, Administrative Law Judge. These cases arise out of a labor dispute that began in 1997 between KSM Industries Inc. (KSM) and its employees' union, the United Paperworkers Union Local 7779 (Union).[1] After the parties' collective-bargaining agreement expired December 31, 1996, the Union commenced a strike on January 3, 1997. The strike ended with the Union's October 5, 1997 unconditional offer to return to work. There has been no subsequent labor agreement. The dispute was the subject of a September 21, 2001 Decision and Order of the National Labor Relations Board (Board), reported at 336 NLRB 133 (2001), in which the Board found, *inter alia* that the Union's strike converted to an unfair labor practice strike on March 19, 1997.[2] In its Decision and Order the Board found that certain of KSM's conduct during and after the strike violated Sections 8(a)(1), (3), and (5) of the National Labor Relations Act (Act), including KSM's failure and refusal to reinstate strikers to their former positions upon the October 5, 1997 unconditional offer to return to work. The Board ordered commensurate remedies including, in paragraph 2(c) of its Order, the direction to make whole employees for any loss of earnings suffered by reason of the Respondent's refusal and failure to reinstate them after the strike. On October 3, 2006, the parties entered into a Stipulation and Partial Settlement Agreement in which KSM waived the right to contest the Board's Order and the findings of fact and conclusions of law underlying the Order. The stipulation also resolved and remedied KSM's liability for certain unilateral changes and bargaining conduct related to health care that the Board had found unlawful. On October 31, 2006, in the absence of further agreement on remedial issues, the Regional Director of Board Region 30 issued a compliance specification alleging the backpay amounts owed to employees under the Board's Order, plus interest accruing to the date of payment. The Respondent filed an answer to the compliance specification on December 1, 2006, disputing the amounts owed. The Regional Director issued an amended compliance specification on March 2, 2007. The Respondent filed an answer to the amended compliance specification on March 23, 2007. The Regional Director issued an amendment to the amended compliance specification on March 21, 2007.

The compliance specification in these cases was tried before me in Milwaukee, Wisconsin, on 8 days between March 26 and April 6, 2007.[3] During the hearing, counsel for the General

[1] In April 2005 the United Paperworkers voted to merge with the United Steelworkers Union. The name of the merged union is set forth in the caption to this Decision, and its local succeeds the United Paperworkers local as the charging party in interest to these cases. In this decision, I refer to both this entity, and the prior charging party, as "the Union."

[2] A correction to the Decision and Order issued November 7, 2001. On August 1, 2002 the board issued an Order Granting Motion for Reconsideration, reported at 337 NLRB 987 (2002).

[3] The compliance issues were consolidated for trial with a complaint alleging additional unfair labor practices. During the hearing the parties reached a settlement on the outstanding unfair labor practice case.

Counsel moved, without opposition, to file a proposed second amendment to amended compliance specification. I granted that motion and directed the Respondent to file an answer to the second amendment to amended compliance specification post-hearing, which the Respondent did on April 23, 2007.[4] The parties filed excellent briefs in support of their positions on or by June 15, 2007. On the entire record, including my observation of the demeanor of the witnesses and other indicia of credibility, and after considering the briefs filed by the parties, I make the following findings of fact, conclusions, and recommended order.

Summary of Issues

This compliance matter concerns KSM's liability for its failure to reinstate strikers upon the Union's unconditional offer to return to work on October 5, 1997, and thereafter, as additional vacancies arose. The case does not concern a present duty to reinstate former strikers. At the latest, by February 2004, all former strikers had been offered reinstatement, permanently severed prior to recall, or in a few instances, had died prior to being recalled. The compliance specification lists 60 former strikers, including 18 for whom the General Counsel alleges no backpay because the General Counsel agrees that these employees would have been on layoff prior to the date on which they returned to work, severed, or declined a recall offer. As to the remaining 42 former strikers, the General Counsel alleges backpay periods of various times from October 5, 1997, forward. The compliance specification and the variety of alleged backpay periods reflects the General Counsel's recognition that at strike's end there was not work immediately available for all strikers.

KSM does not challenge, and therefore effectively concedes, certain facets of the General Counsel's compliance specification. For the very most part, the "numbers," i.e., the measure of increases to pay occurring during the backpay period, comparable earnings that serve as a basis for lost hours, the legitimacy of expenses, and the amount of recoverable medical expenses and costs are not in dispute. The areas of dispute between the parties may be categorized into four general areas, each of which contains a variety of issues.

A. Discriminatees that KSM contends abandoned employment. KSM challenges the General Counsel's position that 11 employees who resigned employment during or after the strike, but before being offered reinstatement, did so under circumstances that fail to show that they intended to permanently sever their employment. According to the General Counsel, these employees resigned in order to obtain 401(k) retirement funds held by the Employer, and/or in the case of two employees, to receive vacation pay, and in the case of some of the employees these motivations were exacerbated by KSM's failure to reinstate the employees at the end of the strike. According to the General Counsel, under applicable Board law these employees' resignations do not disqualify them for reinstatement and do not toll their backpay. The Respondent, on the other hand, contends that these employees severed employment by their resignation, abandoned their employment, and therefore were not entitled to any (or in some cases, any further accrual of) backpay and reinstatement. In challenging the compliance specification in this regard, the Respondent attempts to show that each disputed individual abandoned employment and also asserts more general legal and equitable challenges to the General Counsel's contentions. In addition, the parties dispute whether one employee's negative response to a KSM questionnaire asking employees about their interest in returning to work demonstrates an abandonment of employment.

B. The reinstatement process. All parties accept that due to the presence of "protected strike replacements" and due to a decline in production-related work opportunities, at the strike's conclusion KSM was not immediately required to reinstate all of the former strikers.[5] At the same time, all parties agree that KSM did not reinstate as many former strikers as soon as it should have. In other words, KSM agrees with the General Counsel that it is liable, to some extent, for reinstatement-related issues. This shared understanding notwithstanding, KSM and the General Counsel offer competing accounts of the number of available positions at given times and these competing accounts, of course, result in competing conclusions as to when employees should have been offered reinstatement and the amount of backpay owed. KSM specifically challenges the General Counsel's allegations regarding availability of work for

All parties and the alleged discriminatee (Bruce Miller) were in accord with the settlement. (Tr. 722–733). In view of this, I granted the General Counsel's unopposed motion to sever the unfair labor practice case, Case 30–CA–15096, and remand that case back to the General Counsel for handling consistent with the parties' settlement. See, e.g., *Gamewell Mfg.*, 291 NLRB 702 (1988). The settlement resolved all issues raised in 30–CA–15096 and all compliance issues relating to reinstatement and backpay allegedly due Bruce Miller.

[4] The Respondent's answer to the second amendment to amended compliance specification is hereby received. The proposed second amendment to amended compliance specification is hereby included in the formal papers in this proceeding as GC Exh. 1(gg). Respondent's answer to it is included in the record as GC Exh. 1(hh), and the Index and description of formal documents (formerly GC Exh. 1(gg)) is renamed GC Exh. 1(ii). I note that throughout this decision general references to the "compliance specification" are to the extant specification that is the product of all amendments and not to the original superseded version.

[5] In the underlying Decision in this matter, the Board found that the strike converted from an economic to an unfair labor practice strike on March 19, 1997. At the hearing and in their briefs, the parties use the term "protected replacement workers" to refer to replacement workers hired prior to the conversion of the strike. In accordance with the Board's order, the General Counsel and Union accept KSM's position that strikers were not entitled to displace these replacements at strike's end. See, *KSM Industries*, 336 NLRB at 136. In effect, the parties accept that these pre-March 19 replacements were hired as permanent replacements for economic strikers. Similarly, the parties use the term "unprotected replacement workers" to refer to those replacement workers hired after conversion of the strike to an unfair labor practice strike. The parties accept that KSM was required to displace the unprotected replacement workers to make way for returning strikers. With the exception of one strike replacement—hired March 19, 1997—the parties do not dispute the protected or unprotected status of the employees hired during the strike. The dispute over the one replacement worker, of course, affects the reinstatement obligations of Respondent at the strike's conclusion. That issue is considered herein.

particular unreinstated strikers in certain departments in its facility. In addition, KSM disputes the compliance specification's underlying premise that employees for whom there was no immediate vacancy at the strike's conclusion should have been recalled to available positions within their pre-strike department classification in order of their plant-wide seniority. KSM contends that the more appropriate order of recall was the one KSM utilized of recalling unreinstated employees, by department classification, based on whom KSM believed to be the more qualified eligible employee. Finally, the parties dispute the adequacy and consequences of reinstatement offers made to two former strikers.

C. General gross backpay issues. KSM challenges the General Counsel's allegations regarding certain general "across the board" gross backpay calculations. These include the General Counsel's position that the obligation to pay backpay and the duty to reinstate employees to available positions began concurrently with the unconditional offer to return to work on October 5, 1997. KSM, on the other hand, contends that it was entitled to a "reasonable" period to prepare for and implement a recall, and therefore it locates the date of its earliest reinstatement obligation as October 12, 1997, 1 week after the Union's unconditional offer to return. Similarly, KSM and the Government take different positions about the date backpay is tolled by an offer of reinstatement. The varying positions will be discussed herein, but involve questions such as whether backpay tolls the date an offer of reinstatement is mailed, or when it is accepted or rejected, or some reasonable time after receipt. Also in dispute is KSM's position that the October 3, 2006 Stipulation and Partial Settlement Agreement, entered into between the General Counsel, the Union, and KSM, operates to waive and exclude from gross backpay recovery for the out-of-pocket costs of health insurance premiums incurred during the backpay period. KSM does not dispute that in the absence of the stipulation such out-of-pocket payments would be included in gross backpay. However, it contends that in this case the Government and the Union waived the right for employees to be reimbursed for such payments through the unambiguous terms of the stipulation.

D. Mitigation and offset issues. The parties also dispute a variety of issues related to discriminatees' duty to mitigate their damages. These issues include KSM's challenge to the efforts of certain individual employees to seek and maintain interim employment, and in one instance, KSM's assertion that a discriminatee concealed interim earnings. In addition, based on testimony at the hearing regarding interim employment and mitigation efforts, there are some miscellaneous changes to the backpay figures for certain discriminatees urged by the General Counsel and/or the Respondent. Finally, the Respondent disputes the extent of the offset for interim retirement benefits received or available to discriminatees.

Summary of Board Compliance Precedent and Conclusions on Undisputed Issues

A finding by the Board that an unfair labor practice was committed is presumptive proof that some backpay is owed. *Minette Mills, Inc.,* 316 NLRB 1009, 1010–1011 (1995); *Arlington Hotel Co.,* 287 NLRB 851, 855 (1987), enfd. in part. 876 F.2d 678 (8th Cir. 1989); *NLRB v. Mastro Plastics Corp.*, 354 F.2d. 170, 178 (2nd Cir. 1965), cert. denied, 384 U.S. 972 (1966). The General Counsel's burden in a backpay proceeding is limited to showing the gross backpay due each discriminatee. *J.H. Rutter Rex Mfg. Co. v. NLRB,* 473 F.2d 223, 230–231 (5th Cir.) cert. denied, 414 U.S. 822 (1973). The General Counsel has discretion in selecting a formula that will closely approximate backpay. He has the burden of establishing only that the gross backpay amounts contained in a compliance specification are reasonable and not an arbitrary approximation. *Performance Friction Corp.,* 335 NLRB 1117 (2001); *Mastell Trailer Corp.,* 273 NLRB 1190 (1984). Any formula which approximates what the discriminatees would have earned had they not been discriminated against is acceptable if not unreasonable or arbitrary in the circumstances. *La Favorita, Inc.,* 313 NLRB 902, 903 (1994), enfd. mem. 48 F.3d 1232 (10th Cir. 1995). Once the gross backpay amounts are established, the burden shifts to the employer to establish facts that would negate or mitigate its liability. *United States Can Co.,* 328 NLRB 334, 337 (1999), enfd. 254 F.3d 626 (7th Cir. 2001); *Mastro Plastics,* supra. Thus, in challenging the General Counsel's calculations, the burden is on the employer who committed the unfair labor practice to establish facts that reduce the amount due for gross backpay. *Atlantic Limousine,* 328 NLRB 257, 258 (1999), enfd. 243 F.3d 711 (3d Cir. 2001); *Florida Tile Co.,* 310 NLRB 609 (1993), enfd. 19 F.3d 36 (11th Cir. 1994). Any uncertainty about how much backpay should be awarded to a discriminatee is resolved in his or her favor and against the respondent whose violation caused the uncertainty. *Alaska Pulp Corp.,* 326 NLRB 522 (1998), enfd. in part, 231 F.3d 1156 (9th Cir. 2000). *Intermountain Rural Electric Ass'n,* 317 NLRB 588, 590–591 (1995), enfd. mem. 83 F.3d 432 (10th Cir. 1996).

"This does not mean, however, that the Board will always approve the General Counsel's backpay formula even if it is reasonably designed to arrive at the approximate amount of backpay due." *Alaska Pulp Corp.,* 326 NLRB at 523. The objective is to reconstruct as accurately as possible what employment and earnings the discriminatee would have had during the backpay period had there been no unlawful action. *American Mfg. Co. of Texas,* 167 NLRB 520 (1967). The Board may borrow elements from the suggested formula of each party to account for conditions described in the evidence and thereby meet its objective of accurately reconstructing backpay amounts. *Hill Transportation Co.,* 102 NLRB 1015 (1953).

Upon consideration of the General Counsel's compliance specification, I find that as to those portions of the compliance specification that are *unchallenged by the Respondent*, the General Counsel has met his initial burden of establishing the reasonableness of the gross backpay amounts contained in the compliance specification. The testimony of the Region's compliance officer, Richard Neuman, was thorough, well organized, and cogently presented. For the most part, I accept with only minimal further discussion (sometimes necessary as background to a disputed issue) the methods and calculations of the compliance specification to the extent unchallenged by the

Respondent. I now turn to the issues raised by the Respondent regarding the General Counsel's compliance specification.

Analysis of Contested Issues

A. Employees that KSM contends abandoned employment prior to recall

1. Resigning employees

With regard to 11 discriminatees who the General Counsel alleges are entitled to backpay, the evidence demonstrates that they resigned their employment either during the strike (in the case of 5 of the employees) or after the strike ended but before the Respondent offered them reinstatement (in the case of 6 of the employees). In the compliance specification, the General Counsel contends that these employees' resignations did not terminate their right to backpay or reinstatement as they resigned for the purpose of obtaining their funds from the KSM-maintained 401(k) plan and/or to receive vacation pay, and (in the case of certain of the employees resigning after the strike) because of KSM's unlawful failure to offer timely recall. Respondent contends that with their resignation these employees abandoned their employment and lost their right to reinstatement. As to those employees who resigned during the strike, the Respondent contends no backpay is owing. As to those who resigned after the strike ended and after the General Counsel contends they should have been recalled, the Respondent contends that the resignations tolled the accrual of any further backpay if any was owed as of the date of resignation.

There is a fairly well developed body of Board precedent concerning the issue of employee resignations during or after a strike. It is part and parcel of a larger body of precedent concerning the showing necessary to demonstrate that a striker has abandoned employment, and therefore need not be offered reinstatement.

> An employer is not required to offer reinstatement to strikers who have abandoned their employment. In order to establish abandonment of employment, however, an employer must present "'unequivocal evidence of intent to permanently sever [the striker's] employment relationship.'"

L.B.&B Associates, Inc., 346 NLRB 1025, 1029 (2006) (quoting, *Harowe Servo Controls,* 250 NLRB 958, 964 (1980) (quoting *S & M Mfg. Co.*, 165 NLRB 663 (1967))); *Augusta Bakery Corp.,* 298 NLRB 58 (1990), enfd. 957 F.2d 1467 (7th Cir. 1992); *Medite of New Mexico, Inc.,* 316 NLRB 629 (1995). It is the Respondent's burden to rebut the presumption that employees did not intend to abandon their employment with KSM. *Marchese Metal Industries, Inc.,* 313 NLRB 1022 fn. 1 (1994). Of particular significance to the issues posed in this case, "[t]he Board has consistently held that a striker's resignation in order to accept another job or to obtain pension funds will not of itself be evidence of abandonment of the struck job. Rather, the board will examine the relevant circumstances to determine whether the striker has expressed an unequivocal intention not to return to his former job." *Alaska Pulp Corp.,* 326 NLRB at 524 (footnote omitted). As the Board explained in *S & M Mfg. Co.,* supra at 663–664, in reasoning applicable to resignations undertaken in order to obtain access to retirement funds as well as in order to secure other employment,

> "the resignations of these employees was a prerequisite to securing even interim employment elsewhere. This does not establish, however, that these employees had necessarily made a decision permanently to terminate their employment should they subsequently be offered reemployment. In these circumstances and absent any other evidence of a permanent employment termination, we find that mere submission of their 'resignations' did not constitute an unequivocal abandonment of their status as strikers or of their right to further employment with the Respondent."

In cases where an employee has resigned, in considering whether the employer has demonstrated "unequivocal evidence of intent to permanently sever" (*Harowe*, supra), the Board has considered a range of "relevant circumstances," including evidence that the striker resigned because it was the only way to obtain money from a retirement or benefits fund, whether the employee told the employer that he had found other work (*Medite*, supra), whether the striker expressed an economic need to obtain the contributions, and whether the striker abandoned the strike following the resignation. (*Rose Printing,* supra).[6]

In this case, the 401(k) plan at issue was the product of negotiations for the1994 collective-bargaining agreement. During those negotiations, the parties agreed to the establishment of a KSM-sponsored 401(k) retirement plan. The plan replaced a profitsharing plan and funds from the profitsharing plan were placed in employees' 401(k) accounts. The plan provided for employee participant contributions, composed of salary deferred contributions, and a 25 percent employer matching contribution up to a total employer contribution of between $400 and $500 per year of the contract. The parties' 1994 collective-bargaining agreement provided for the establishment of the plan and specified the employee and employer contribution levels. By all evidence other features of the plan were unilaterally determined by KSM working with its third-party benefits advisors. The plan set forth specified methods for a participant employee to obtain funds from the plan. Retirement at age 65, or disability entitled a participant to receive his account balance. Participants who were age 59 ½ years of age could withdraw their salary deferred contributions. For nondisabled participants under age 59 ½ there were only limited distribution options. One was to terminate employment, at which point the employee could receive the salary deferred and vested portion of the employer contributions. The plan also provided that participant employees could withdraw the salary deferred por-

[6] General Counsel contends that *Rose Printing* stands for the proposition that where a striker qualifies his resignation by stating (through resignation letter or comment) that he is resigning in order to obtain benefits fund monies, this serves as conclusive proof that he is not abandoning his employment. I agree that such evidence adds to the case against abandonment, but nothing in *Rose Printing* suggests that it is conclusive. Rather, *Rose Printing* and subsequent cases make clear that all the relevant surrounding circumstances should be considered in determining whether an unequivocal intent to abandon employment has been proven.

tion of their account based on a verifiable "immediate and heavy financial need of a participant." However, these "hardship withdrawals" were limited to distributions on account of four necessities: medical expenses, the purchase of a principal residence, payment of post-secondary tuition and related fees, and the need to prevent foreclosure or eviction from a principal residence, and then only for the amount justified by the qualifying hardship. Hardship withdrawals came at a cost. They were considered "early withdrawals" subject to a 20 percent federal tax and an early withdrawal penalty. Unlike some 401(k) plans, this one did not permit participants to take loans from the plan. This 401(k) plan, with the described withdrawal options remained in effect after expiration of the labor agreement and throughout the strike and relevant poststrike period.

As part of the Government's contention, the General Counsel argues that the Respondent, and specifically, David Oechsner, currently KSM's president, and a top manager before during and after the strike, engaged in a course of conduct designed to encourage strikers to abandon employment and waive reinstatement. According to the General Counsel, Oechsner induced employees to resign to obtain 401(k) funds as a means of removing strikers from employment. Oechsner had primary responsibility at the facility for, among other things, the administration of benefits plans such as the 401(k) plan. Attendant to this, argues the General Counsel, Oechsner rigidly enforced the restrictions on hardship withdrawals from the plan so that employees would be more likely to terminate in order to receive 401(k) funds. General Counsel argues that prior to the strike, and after the strike with regard to nonstrikers, requests for hardship withdrawals were granted without as much regard for whether the reason for the request met the plan rules and without the same vetting of documentation in support of the request that Oechsner utilized once the strike began. The General Counsel further contends that Oechsner purposely failed to inform employees seeking funds about the possibility of a hardship withdrawal and also misled employees by telling them that they had to resign in order to receive earned vacation pay. In sum, the General Counsel contends that Oechsner's actions essentially preclude KSM from establishing that strikers resigning to obtain 401(k) or vacation funds intended to abandon their employment and permanently sever.

The evidence does offer some support for some of the General Counsel's contentions, but I think General Counsel overstates both the fact and the legal consequences of Oechsner's dealings with employees. It is hard to miss, in multiple employees' accounting of their discussions with Oechsner about obtaining their 401(k) funds, the consistent alacrity with which Oechsner suggested that they would need to resign in order to obtain their funds. Clearly, a resignation suited the Respondent just fine. Having said that the evidence does not support a claim that Oechsner misrepresented the terms of the 401(k) plan or the options available to strikers who sought to withdraw money from their 401(k) accounts. The record does not contain a single instance in which I conclude that during or after the strike Oechsner intentionally misled an employee regarding rights under the 401(k) plan.[7] The General Counsel points to employee Hanrahan's ability to obtain a hardship withdrawal in the spring of 1996, in the amount of $6720.68, based on documentation showing a failure to pay property taxes—with no threat of foreclosure or eviction—and based on oral representations that his mother's family in Greece needed money for medical expenses, the responsibility for which had been assumed by Hanrahan. The evidence suggests that Hanrahan approached Oechsner in January 1996 about a hardship withdrawal. Oechsner testified that the plan was new to KSM—"We had been in it for barely two years and had only, you know, a small handful of . . . requests to that point so I wasn't clear on it"—so he sent the withdrawal request forms and an explanatory letter to Emjay, the company then administering the plan for KSM. The forms Oechsner sent Emjay indicated that the withdrawal request was for medical expenses. Ultimately Emjay approved the request but before the money was paid KSM switched benefits administrators and began using Strong Retirement Plan Services. New Strong forms, signed by Hanrahan on May 31, 1996, were submitted to Strong, this time listing avoidance of eviction or foreclosure as the basis for the hardship withdrawal. This request resulted in the $6720.68 distribution to Hanrahan, which represented the entire employee portion of his account.

Oechsner admitted that during the strike, employees were required to provide documentation supporting the reason for the withdrawal request and that the request did not exceed the amount needed for the qualifying hardship. That was not the case with Hanrahan prior to the strike. I do not believe Hanrahan would have received his hardship withdrawal, based on the documentation provided in 1996, during or after the strike.[8]

This evidence is relevant, although not, in my view, dispositive of anything. First of all, I accept Oechsner's testimony that in 1996 the plan was new and KSM was still learning how to deal with hardship requests. Moreover, as discussed supra, in

[7] I recognize that there are instances where employees' testimony shows that Oechsner did not discuss in detail why they were ineligible for a loan requested by an employee (the plan doesn't provide for loans) or a hardship withdrawal. But in many cases he did. There is, indeed, only one instance where an employee was misled at all, and Oechsner credibly explained that he originally told Allan Resch that a hardship withdrawal could not be used for medical premiums because that is what Oechsner understood at the time. He later corrected this mistake. I do not believe the record supports the view that Oechsner intentionally misled employees as to their 401(k) options. That is not to say he did not lead employees to resign.

[8] General Counsel also contends that there is evidence that since the strike, two replacement employees and a nonbargaining unit employee may have received hardship withdrawals with less than full substantiation of the reason for the withdrawal and amounts needed. Certainly, in the case of employee Keomany, Phomsouvanh, and Nash, the employer files do not include documentation of the reasons for their hardship request or documentation of the amount needed to meet the hardship. Oechsner testified that he recalled that Phomsouvanh showed him paperwork to document that he was purchasing a home but that Oechsner did not retain a copy. He could not recall whether documentation was provided by Nash or Keomany. None of three testified. In the absence of their testimony, I decline to conclude that they were able to receive hardship withdrawals without adequate documentation.

determining whether an employer has met its burden of proving an employees' expression of an unequivocal intent not to return to his former employment, the Board looks to conduct reflecting the employee's motivations and intent, not the employer's. In considering whether an employee who has tendered a resignation has expressed an unequivocal intent not to return, the inquiry is no different. Obviously, the limitation of options for employees under financial strain, such as the possibility of a hardship withdrawal, factors into the consideration of the motive for an employee's resignation, and whether it is part of an otherwise demonstrated unequivocal intention not to return to his former employment. As does the dangling, if not encouragement, of the resignation option as a way to obtain 401(k) funds. Having said that, I think that the evidence falls short of that necessary to show that any of the strikers who resigned employment would have received hardship withdrawals, under the same circumstances, even prior to the strike. In addition, the evidence, which is essentially confined to showing that Hanrahan received a hardship withdrawal in 1996 that would not have been allowed during the strike, is inadequate to demonstrate a change in terms and conditions, discriminatorily motivated or otherwise, for strikers seeking a hardship withdrawal during and after the strike. At trial, and on brief, the Respondent stressed the necessity for Oechsner as benefits administrator to follow the plan rules and relevant federal regulations in his administration of the plan. That is his obligation, and if, prestrike, a more relaxed attitude prevailed (demonstrated in only one circumstance) I am unable, on this record, to find that employees have been discriminated against because the Respondent began following the plan's rules concerning the provision of hardship withdrawals. But what must, in sum, be viewed a highlighting and encouragement of the resignation option to inquiring strikers is obvious, and is relevant to assessing the intentions and motivations of strikers who resigned.

I think that KSM's treatment of vacation pay for striking employees must also be considered. My conclusion is somewhat different on that score. Resigning for vacation pay was a less significant alleged motive for resignation (except in the case of one or two alleged discriminatees) but there was considerable evidence provided at trial related to the issue of whether KSM was illegitimately denying strikers vacation pay. I am unprepared to rule (and need not do so) on whether the Respondent was, as it claims, correctly applying the vacation pay provisions of the expired labor agreement, but I do think the evidence shows two things: (1) that Oechsner's explanation at trial of the application of the vacation pay provisions was consistent and coherent (if somewhat complicated), and (2) he followed this understanding of the vacation pay policies, *except* in a couple of instances where his desire to encourage employees to resign prompted him to tell two employees that they had to resign in order to obtain vacation pay. As discussed herein, it is clear to me that, as part of KSM's interest in encouraging employees to resign, Oechsner did condition receipt of Mark Rettler and Robert Hanrahan's vacation pay on their resignation, in violation of KSM's own understanding of the vacation pay provisions. This does reveal an unseemly aspect to Oechsner's dealings with employees. Again, however, while it factors into my assessment of employees' intentions when they resigned, it is not dispositive of any issue and does not preclude the Respondent from demonstrating an intent to abandon employment by any employee.

At this point, I turn to the evidence regarding the individuals who resigned employment but who the General Counsel alleges continued accruing backpay and reinstatement after the resignation.

a. Resignations during the strike

I. ANTHONY BANNENBERG

In February 1997, striker Anthony Bannenberg wrote to KSM because he was having "some financial difficulties and I needed to—I wanted to try to get my 401K out." KSM sent Bannenberg a distribution form that he filled out and sent back to KSM.[9] KSM responded with a letter from Oechsner to Bannenberg, dated February 21, 1997. On February 21, 1997, Oechsner called Bannenberg at his interim employer, Performance Products. According to Bannenberg, Oechsner "told me that I would also, in order to sign off on my 401K, I would have to put in a quit slip. I would have to quit the company." Bannenberg told Oechsner "that if that's what I have to do, then I have no choice because I need the money." Thereafter, Bannenberg received a letter from Oechsner, dated February 21, 1997, returning the distribution forms so that his wife's signature could be notarized but also confirming that "as I explained in our phone conversation today, I will also require a written statement from you confirming your voluntary termination from employment at KSM Industries." Subsequently, Bannenberg sent in the notarized form, accompanied by a note, dated February 27, 1997, stating that he was "resigning my position at KSM Industries as of the moment you read these words." Bannenberg received a distribution check dated March 6, 1997 from Strong in the amount of $5,111.00.

Bannenberg testified that "I wouldn't have quit if I wasn't put in the position to do so because I needed this money, otherwise I would have never signed a quit slip."[10] When he resigned he was earning less money at his interim employer than he had at KSM. He continued to picket with the strikers until June 1997, notwithstanding his interim employment.[11] In No-

[9] There is a suggestion in Oechsner's account that Bannenberg's initial request included a request for a loan, although Bannenberg's testimony did not raise that.

[10] Oechsner suggested that Bannenberg would need to quit to receive his 401(k) funds, and there is no evidence that Bannenberg qualified for a hardship withdrawal that would have provided an alternative to resigning to obtain 401(k) funds. Oechsner did not mislead Bannenberg in this regard. By the same token, given Oechsner's encouragement, and his position as KSM's benefits administrator, the suggestion in Respondent's brief that Bannenberg did not adequately explore alternatives to resignation is entitled to very little weight in considering Bannenberg's intentions.

[11] Employee Graf testified that in the spring of 1997 in the Union's "picket trailer" Bannenberg told him "he had to quit in order to obtain his 401K." I admitted this evidence over Respondent's hearsay objection. The testimony was not offered to prove the truth of the statement, something, in any event, that no one disputes. The statement corroborates Bannenberg's testimony that he remained involved with the union

vember 1997, Bannenberg obtained a copy of an October 16, 1997 letter sent by KSM to each employee listed as a nonresigned striker after the Union's unconditional offer to return to work. The letter, on KSM letterhead, asked, "Do you wish to be considered for future recall to KSM Industries as positions for which you are qualified become available?" Bannenberg marked "Yes" in the appropriate spot beneath the question and provided his name, address, and number. He signed the form and sent it to KSM, which received it November 6, 1997.

Respondent suggested through questioning at trial that Bannenberg marked the "Termination of Employment" box on the distribution request paperwork when he originally sent the form in and before Oechsner told him he had to quit. According to the Respondent, this bolsters its contention that Bannenberg intended to sever employment even before being told by Oechsner that he would have to quit in order to receive any 401(k) funds. Without regard to what it would mean if Bannenberg had preemptively marked the reason for his distribution request as a termination of employment, the difficulty with the Respondent's argument is that Bannenberg, who I found a creditable witness, straightforward and direct in demeanor, repeatedly denied that he had filled out that portion of the form, *and* his testimony on this point was not disputed. Notably, Oechsner, who obviously did fill out portions of the form (he initialed it in one place), received the form from Bannenberg and would have been situated to testify that he received the form from Bannenberg with the Termination of Employment already marked by Bannenberg. Oechsner did not do so, nor did he deny the implication of Bannenberg's testimony, that the mark beside the Termination of Employment box was Oechsner's.[12]

Respondent has produced no evidence of an unequivocal intention by Bannenberg not to return to his job at KSM. I credit Bannenberg's contention that he resigned in order to obtain 401(k) funds. I credit his unrebutted assertion that he told Oechsner this when he agreed to resign. There is no other evidence that Bannenberg "expressed an unequivocal intention not to return to his job." He was earning less money at his interim employer at the time he resigned, and the employer has made no showing that he preferred that job. He continued to picket after the resignation, thus showing continued interest in and concern with the future terms and conditions of employment at KSM.[13] Perhaps most telling, in November 1997 Bannenberg took it upon himself to forward to KSM a copy of the questionnaire sent to employees and affirmatively indicated his desire to return to his former job. This is the opposite of abandonment.[14] I find that KSM has failed to carry its burden of demonstrating that Bannenberg abandoned his employment when he resigned from KSM.

II. MARK SNYDER

Mark Snyder was a striker who worked for KSM as a shear operator at the time of the strike. In 1997 he "fell behind on bills." He got a "temporary job" and also called KSM in early April 1997 in order to "withdraw my 401(k) money." According to Snyder's credited (and essentially uncontroverted) account of the conversation, he asked Oechsner about receiving his 401(k) funds and Oechsner responded, "[o[h, are you quitting?" Snyder testified that he told Oechsner that he did not want to quit, and also told him that he needed the money. Oechsner testified that Snyder asked about obtaining a loan but that Oechsner told him that the plan did not permit loans. Snyder testified that Oechsner did not mention the possibility of a hardship withdrawal, but he also testified that he did not tell

after his resignation and, of course, evidences his understanding that quitting was necessary to obtain his 401(k) funds.

[12] As discussed in other parts of this decision, for the most part I found Oechsner to be an honest, credible witness. There were some exceptions to this, usually related to Oechsner's response to a broad general question relating to his intent or practices. There are times when I believe that in considering specific instances and conversations, a broad denial offered without reference to the specific incident must be discounted in light of other evidence. In addition, there is no question that, at times the volume of Oechsner's testimony, during which he was asked to recount multiple conversations and decisions made nearly a decade ago, taxed his present independent recollection. To some extent his recounting of his conversations with the resignees involved an element of reiteration of what he currently believes he would have said in such a conversation, what the documentary evidence suggested to him, and sometimes, what he believes KSM's policy should have been. At the same time, Oechsner was a careful witness and did not rebut that which he felt he could not. The instance described in the text is of several where I think his failure (and his counsel's failure to solicit) specific contradictory testimony adds weight to the testimony of the other party to the conversation.

[13] The assertion in Respondent's brief (R. Brief at 32) "Bannenberg also abandoned the strike after his resignation" is contradicted by the record. That he stopped receiving strike benefits is not evidence of abandonment as there is no evidence that strike benefits were paid on that basis, as opposed to need. Respondent's claim (R. Brief at 32) that "[e]ven the Union considered him to have quit and to have abandoned the strike" is without basis in the record.

[14] Thus, Respondent's assertion on brief (R. Brief at 32) that after his resignation Bannenberg "never contacted Respondent again after his resignation, thus, failing to express any interest or preparedness in returning to work for Respondent," is false. "That [he] did so, however, further undermines Respondent's claim of abandonment." *Zimmerman Plumbing and Heating Co.*, 339 NLRB 1302, 1304 fn. 6 (2003). I note here that Respondent makes this claim with regard to nearly every disputed resignee, and in many instances it is true that the employee did not subsequently contact Respondent. However, unreinstated strikers who have offered (individually or through their union) to return to work are not required to maintain contact with the employer in order to preserve their reinstatement rights. *Zimmerman*, supra. Nor are they required to prove their continued interest by reapplying for their jobs. See *Sunol Valley Golf & Recreation Co.*, 310 NLRB 357, 373 (1993), enfd. 48 F.3d 444 (9th Cir. 1995). Respondent cites the observation by Member Hurtgen, dissenting in *Alaska Pulp*, supra at 538, that, among other factors persuasive to him in determining that certain employees in that case had abandoned their employment was the fact that the strikers had failed to express interest in reinstatement after their resignation. Notably, the Board majority in *Alaska Pulp*, supra at 528, reaffirmed that,

> "[u]nder *Laidlaw*, once the union made an unconditional offer to return to work on behalf of all strikers, the burden shifted to Respondent to seek out strikers as their prestrike or substantially equivalent positions became available to offer reinstatement. Thus White was entitled to simply wait for a valid offer of reinstatement." (citations omitted).

Oechsner any of the reasons he needed the money.[15] Oechsner told Snyder that "if he received my letter of resignation he would then forward me the paperwork to receive my 401K." Snyder prepared and sent the resignation to KSM by letter dated April 2, 1997. The letter included a request for the "rollover forms for 401(k)" and his accrued vacation pay.[16]

Snyder testified that he resigned from KSM in April 1997 "[b]ecause I needed all the money I could get at the time" and testified that he "cashed out" his 401(k) money "as soon as he got it." However, he did not send in the distribution forms he received from Oechsner until mid-July, a 3 month delay in submitting the forms that he was specifically asked about but could not explain.[17]

At the time he resigned, Snyder was earning $4.80 less per hour at the job he had taken at Hartford Finishing after the strike began.

In his discussion with Oechsner he did not tell Oechsner he was working elsewhere. Once Snyder resigned, he ceased picketing activity.

The evidence pertaining to Snyder does not present as overwhelming a case as Bannenberg. However, Respondent bears the burden of "present[ing] unequivocal evidence that [Snyder] intended to sever his employment relationship with Respondent when [he] sought and obtained his money from the 401(k) plan" (*Medite*, supra) and the evidence is far from unequivocal in this regard. Snyder was an articulate and intelligent witness and gave every indication of honestly testifying. I credit his stated motivation for resigning as being the only means to obtain 401(k) money. Notably, the undisputed account of his conversation with Oechsner is consistent with this asserted motive: Oechsner, not Snyder, first raised the prospect of quitting when Snyder called to inquire about obtaining his 401(k) money and Snyder told Oechsner that he did not want to quit, and also told him that he needed the money. I note that Snyder's letter asked for a "rollover" form, but that is the same form used to request a cash distribution and that is what he took. Oechsner did not recall any discussion of a rollover and, by itself, the use of the term to request the forms is not particularly meaningful. Obviously, the delay in submitting the distribution forms after the resignation could be construed as an indication that the resignation was motivated by something other than financial pressure, but that is not necessarily (or more to the point, unequivocally) the case. Financial insecurities may well have driven Snyder to resign, but with ready access to the money assured he may have found other sources of funds or delayed payments for 3 months before liquidating the 401(k). There is no requirement that an employee resign destitute in order to be adjudged to have resigned while still being ready to return to his former employer. It is true that Snyder ceased picketing after resigning, but this factor must be balanced against others, such as the fact that Snyder was earning considerably less money at his interim employer at the time he resigned and did not convey to KSM that he was working elsewhere, or that he did not want to return to work. At the time of the resignation Snyder's compensation was nearly 1/3 less than his KSM compensation, and there is no evidence at all that at the time of the resignation he knew, or was on track, or otherwise had reason to think that in the long run this job would be a better one than KSM. In sum, the evidence might well be judged mixed, and equivocal, but Respondent has failed to show unequivocal evidence of Snyder's intent to abandon his employment at the time he resigned. I find that KSM has failed to carry its burden of demonstrating that Snyder abandoned his employment at the time he resigned from KSM.

III. MARK RETTLER

Mark Rettler was a striker who had worked at KSM since 1988. At the time of the strike he worked in the shear department. During the strike, on or about April 10, 1997, Rettler contacted Oechsner. He testified that he was "falling behind on bills and at the time I needed money. So I called and I asked for my vacation pay that I had coming towards me." Rettler's undisputed testimony was that he told Oechsner that "I needed the money to catch up on bills. I'd borrowed some money from my in-laws to catch up on my mortgage." Oechsner "informed me that for me to receive my vacation pay, that I would have to send him a letter saying that I'd resign my job." The next day, Rettler wrote such a letter, stating his wish "to terminate my employment effective immediately" and adding, "[p]lease issue all vacation pay due to me as soon as possible." Subsequently, Rettler received his vacation pay, which according to notes handwritten at the bottom on Rettler's typed resignation letter,

[15] Oechsner testified that it was his practice to tell employees about the hardship option, but he did not specifically recall whether he did so in this instance. I believe that he did not. Respondent, with regard to nearly every resignee, trumpets the fact that they admitted to not having read through the 401(k) plan, and did not investigate whether a hardship withdrawal would have been available for their particular circumstance. The suggestion is that an employee who did not want to abandon employment would have aggressively studied the plan and affirmatively sought advice on how to do that. I have considered, but do not accord much weight to this argument. This is quite a high standard to judge striking employees by, or anyone for that matter. Most employees relied upon Oechsner's advice—he was the KSM manager in charge of assisting employees with benefits—and his advice consistently highlighted the option of resigning. Some employees were not forthcoming with Oechsner about the specific financial problems they needed the money for, but it must be remembered he was a top executive at the employer they were on strike against. A reluctance to discuss the details of financial distress with Oechsner is not remarkable and does not evidence a lack of interest in avoiding having to resign.

[16] Notwithstanding Snyder's use of the term "rollover" in requesting the 401(k) forms Oechsner did not recall any discussion with Snyder about the possibility of him "rolling over" his account to another 401(k). He did not, in fact, rollover his 401(k) but took a cash distribution.

[17] The record is not clear as to how quickly the forms were sent to Snyder, however, the evidence suggests that they would have been received within a week or two. A note added to Snyder's letter requesting the forms, surely by Oechsner or his staff , indicates the forms were sent April 8, 1997. Snyder recalled no delay in the receipt of the forms (he testified that "it could have been a week, it could have been a month," but in fact, he could not remember), and based on evidence regarding other employees, Oechsner wasted no time in supplying the forms.

presumably by Oechsner, equaled 88 hours of pay at his hourly rate, paid out on April 14.[18]

It is significant that Oechsner did not dispute Rettler's account in any way. As I have said, Oechsner was a careful, and generally honest witness, and the result of those two attributes is that Oechsner's silence on a subject is telling. That is particularly true here because Rettler's testimony specifically undercuts Respondent's assertion that no employee was required to resign to obtain vacation pay.[19] Based on his years of service, Rettler would have qualified for 120 hours on the last anniversary of his employment, September 11, 1996. The evidence indicates he was paid out 88 hours on April 14, suggesting that at some point between September 11 and the beginning of the strike Rettler took 4 days (32 hours) of vacation. But under Oechsner's interpretation of the vacation plan, Rettler should have been able to simply ask and receive any vacation earned as of his last anniversary date. The undisputed evidence is that Oechsner, in violation of his own understanding of the vacation pay policies, required Rettler to resign in order to receive vacation pay owed to him. There was, indeed, an overriding policy at this time by KSM to encourage employees to resign.

Rettler testified that when he called Oechsner in April 1997 he had not wanted to resign, and would not have if Oechsner had not told him he needed to resign to obtain his vacation pay. After resigning, Rettler continued to picket for a month or two. At the time of his resignation he was working at Performance Mold Products earning $3.00 an hour less than he had at KSM, although he did not share his employment situation with Oechsner.

Rettler's testimony at trial that he only resigned to obtain his vacation pay is corroborated by the undisputed evidence that he informed Oechsner when he resigned that he was calling Oechsner because he "needed money" and was seeking vacation pay. I believe Rettler would not have resigned if he had not been misled by Oechsner who erroneously told him that he had to resign in order to receive his vacation pay. By itself, this is enough to establish that Rettler did not intend to abandon his job when he resigned. See, *MCC Pacific Valves*, 244 NLRB 931 (1979) (finding 8(a)(3) violation and, most pertinently, ordering reinstatement and backpay where employee required to sign termination slip in order to receive already earned vacation pay). "Any uncertainty in this regard" must be held "against the Respondent, the wrongdoer, here." *Alaska Pulp*, supra at 525.

But even independent of the fact that Oechsner misled Rettler into resigning, Respondent has failed to prove that Rettler abandoned his job when he resigned. Respondent points out that Rettler left his 401(k) funds with KSM until 2004, but the record does not reveal how much was in his 401(k) or that the 3 weeks of vacation pay was insufficient to ameliorate his immediate need for extra cash, so this cannot be said to prove much. Rettler's interim employment paid significantly less than his KSM job, which obviously cuts against the contention that he had lost interest in returning to his former employment. His picketing continued for a period of time after the resignation which suggests that at the time of the resignation he had not lost interest in the future terms and conditions at KSM. That he resigned only to obtain the funds Oechsner conditioned on a resignation is evidenced by his credited account of his discussion with Oechsner. Respondent has failed to prove that Rettler abandoned his job when he resigned.

IV. ALAN RESCH

Alan Resch worked as a Finisher A when the strike began. He testified that during the strike "[w]e were having hardships with the mortgage and other bills that were due," including "my health insurance." After the strike began he and his wife and children were not covered by health insurance. Resch attempted to make a hardship withdrawal from his 401(k) account. He contacted Strong and received the appropriate forms, completed them, and with a cover letter dated February 18, 1997, mailed them to KSM. Although his forms, correctly, sought a hardship withdrawal, Resch's cover letter referenced a request for a "hardship loan."

Oechsner responded in a February 21, 1997 letter that returned the forms for his wife's signature. Oechsner's letter explained that the signature must be notarized and suggested some ways obtain a notarized signature. Oechsner also wrote that "Federal Law requires documentation supporting both the reason for the hardship withdrawal and the amount requested. Hardship withdrawals are limited to the amount necessary to meet the financial hardship." Finally, noting Resch's reference in his cover letter to a "hardship loan," Oechsner emphasized that the 401(k) plan had no provision for loans and that funds withdrawn through a hardship withdrawal "are considered early withdrawals and are subject to both a 20% federal tax and a 10% early withdrawal penalty. In addition future participation in the plan must be suspended for a period of 12 months." The letter closed by asking Resch to "[p]lease call if you have any questions."

The next day Resch called Oechsner. He explained to Oechsner the reasons he wanted to take the money out of the 401(k), chiefly, in order to pay for medical insurance premiums to cover him and his family. Oechsner told Resch that "[i]t just couldn't be done. . . . [I]f it was for a medical emergency then it could possibly be done, but not for just paying the premiums." Resch also discussed needing money for mortgage payments. Oechsner said that could not be done unless the house was going in foreclosure, and that Resch "would have to bring foreclosure . . . papers up to him to review and then he would decide whether or not he would release the money." Resch asked, Oechsner, "well isn't there any other way [of] going about getting the money out of there for the purposes that I needed it for." Oechsner told Resch that "the only way I could do that is if I was—quit." Resch told Oechsner he did not want

[18] Rettler also maintained a 401(k) with KSM although the record does not reveal the amount in it. He did not request that money when he resigned and left it with KSM until around 2004.

[19] I thus discredit Oechsner's conclusory and general denial (Tr. 1065) that anyone had to quit their job in order to get their vacation. Rettler did. See, *Mercedes Benz of Orlando Park*, 333 NLRB 1017, 1035 (2001) ("it is settled that general or 'blanket' denials by witnesses are insufficient to refute specific and detailed testimony advanced by the opposing sides' witnesses"), enfd. 309 F.3d 452 (7th Cir. 2002).

to quit, but Oechsner told him that this "was the only way I could get the money."[20]

The next day Resch called Strong and discussed the matter with a Strong employee, Steve LaFore. He told Resch he did not see a problem with a hardship withdrawal in order to make mortgage payments and health insurance payments. Resch then called Oechsner and told him what Strong had said. Oechsner suggested setting up a three-way call with Strong, and the three (Steve LaFore from Strong, Resch, and Oechsner) spoke the following day. However, in this conversation, the Strong representative told Resch that it was up to the plan administrator, Oechsner, whether or not the funds could be released.

At around this same time these conversations were taking place (although the record is not clear on the exact dates) Oechsner was in written and oral conversation with Strong seeking clarification on the rules governing hardship distributions. Based on fax markings (See GC 44 and 45) between February 21 and 26, 1997, Oechsner and Strong Funds exchanged faxes in response to Oechsner's inquiries. These exchanges were not specifically motivated by Resch's distribution request, but his was the most recent since the strike that raised questions Oechsner was unsure how to answer. However, at least one question raised by Oechsner surely was prompted by Resch. Oechsner specifically sought from Strong "documentation to support position on payment of health insurance premiums."

In testimony Oechsner denied that Strong counseled that payment of health insurance premiums could be a basis for a medical expense hardship distribution. As a legal matter, it is clear that they can, and the materials Strong sent Oechsner on February 26 quote the applicable Internal Revenue Service Code section to that effect.[21] However, Oechsner, convincingly, to my mind, testified that he did not understand the rule that way and that Steve LaFore did nothing to correct his confusion.[22] Oechsner continued his discussions with Strong regarding questions he had about hardship distributions and, going up the chain of command at Strong, later learned from Strong vice-president John Persa that payment of health insurance premiums was, indeed, grounds for a hardship distribution. Before learning this from Persa, Oechsner wrote to Resch, in a letter dated March 4, 1997, attaching some pages from the plan document and from the Internal Revenue Code governing 401(k) plans. The letter stated that:

> "Based on IRS rules and advice from Strong Funds I have concluded that payment of your medical premiums would not qualify as a basis for hardship withdrawal. However, payment of *documented* medical expenses would qualify provided all other provisions contained within the above-reference materials are satisfied, such as 'The distribution is not in excess of the amount of the immediate and heavy financial need of the Participant…'" (emphasis in original).

Oechsner's letter also stated that "[h]ardship withdrawals for the purpose of making mortgage payments, the hardship reason you provided Steve LaFore of Strong Funds, is not allowed. If however, the withdrawal is to prevent foreclosure I would require documentation from the lending institution substantiating both the claim and the amount required."

Next, hoping to find another way to pay some of his bills, Resch wrote to KSM on March 29 requesting vacation pay for the period April 7 through 25.

Oechsner's response came by letter dated April 9 and advised "of two recent developments that concern you." First, Oechsner stated, without further explanation that "I am unable to comply with your request for vacation pay starting April 7 and running through April 25, 1997." Second, Oechsner referenced his March 4 letter and stated that "I was informed by Strong Funds on Tuesday April 8, 1997, that their original interpretation of our plan was in error and that withdrawal for the purpose of making health insurance premium payments is indeed valid." Oechsner's letter indicated to Resch that if he was interested in exercising a COBRA option to enroll in the KSM insurance plan, KSM would arrange for Resch's reinstatement in the plan, even though the 60-day COBRA election period had passed, but he would have to "bring the account current" by paying the monthly premium for each month back to January.[23]

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[20] Oechsner did not dispute Resch's account of their phone call and I credit Resch's uncontradicted account.

[21] 26 U.S.C. § 213 states:

> (1) The term "medical care" means amounts paid . . . .
> . . . .
> (D) for insurance (including amounts paid a premiums under part B of title XVIII of the Social Security Act, relating to supplementary medical insurance for the aged) covering medical care . . . .

[22] Oechsner, confused by the language, testified that when he got the materials he called LaFore and said, "You sent me all this nice documentation. Just give me a yes or no answer. Does it apply or doesn't it apply." Oechsner was completely wrong in the view that a medical expense hardship distribution could not be used for insurance premiums, something he learned later from another Strong employee, but based on demeanor and his account generally, I credit his testimony. LaForte, who did not testify, and who presumably is versed in this material is harder to excuse. But I find some substantiation for Oechsner's account in LaForte's waffling in his conversations with Resch (as reported by Resch), and the fact that while he passed along plan language and IRC materials to Oechsner, he did not spell out an answer for Oechsner in writing, leaving Oechsner to interpret these legal documents.

[23] The reference is to the Consolidated Omnibus Budget Reconciliation Act (COBRA), 29 U.S.C. § 1161 et seq., which provides for the extension of medical care coverage to employees, their spouses and dependent children who would lose such coverage because of termination or a reduction of work hours. COBRA requires employers to give such employees, spouses and dependent children written notice of their rights under the law to continue at their own expense to participate in the employer's medical plan for a period of 18 months unless they obtain similar coverage through re-employment prior to the expiration of that time period. A strike has been held to be a reduction in hours that entitles employees to COBRA coverage. COBRA requires that qualified plans provide employees with a minimum 60 day period to elect continuation coverage (29 U.S.C. § 1165) and KSM's plan so provides, although, as noted, Oechsner's letter indicated a willingness to allow Resch to elect to continue his coverage even though the 60 period had passed. The requirement that Resch enroll retroactively to the date of loss of coverage because of the strike is required by COBRA. See, 29 U.S.C § 1162(2) (directing that coverage must extend "from the period beginning on the date of the qualifying event").

Resch testified that this last requirement dissuaded him from taking a medical expense withdrawal from his 401(k) for the purpose of enrolling in the KSM health care plan. In addition, a medical expense withdrawal would not permit him access to the 401(k) funds for house payment and other bills beyond anything necessary for medical expenses and premiums. Instead, by letter dated April 17, Resch wrote Oechsner and announced he was terminating his employment with KSM. Resch testified that he took this step "[m]ainly because my obligations for bills and what not were starting to overwhelm and I had to do something to take care of these bills." At the same time (and probably in the same envelope), Resch submitted a completed 401(k) distribution request form seeking distribution of his entire vested 401(k) account. Resch testified that he would have preferred not to resign his employment "but it was the only way to get the money for the things I needed it for."

After resigning in April 1997, Resch continued to picket, although to a lesser extent. He stopped receiving strike benefits from the Union when he obtained interim employment in March, because, in his view the union's "money could have been used for better things," and he was picketing less. When Resch resigned, he was working through a temporary agency earning less than he had at KSM. However, in his conversations with Oechsner he did not inform Oechsner of this.

In October 1997, Resch obtained one of the KSM return-to-work questionnaires that KSM sent directly to employees who were not listed as resigned. Resch obtained the form from James Malson, the local union president. He completed the form, indicated that he wanted to be considered for recall, and gave the form to Malson. Across the bottom of the form the words "Terminated employment due to financial hardships" were handwritten. A stamp on the letter indicates that KSM received it on October 25, 1997.[24]

As alluded to, supra, I accept Oechsner's contention that he did not intentionally mislead Resch with regard to the ability to take a hardship withdrawal to pay health insurance premiums. Nevertheless, Resch was misled by Oechsner from February through April, and during this period, while Oechsner was denying Resch the right to take a medical expense 401(k) withdrawal, Oechsner raised with Resch the prospect of resigning his employment in order to provide access to the 401(k) funds. The record shows an individual searching for ways to avoid resigning. That Resch ultimately succumbed to this suggestion is consistent with Resch's assertion that financial hardship motivated his actions. Of course, by the time he resigned he knew that he was eligible for a medical expense withdrawal. Respondent contends that the real reason Resch ultimately opted for resignation instead of a hardship withdrawal is that he had obtained other employment in April and was therefore ready to permanently sever from KSM. That is plausible, but hardly proven. Other evidence cuts against it. For one thing, an equally plausible point is that while Resch waited weeks and weeks for Oechsner and KSM to figure out that he was eligible for a hardship withdrawal his bills mounted even further. A resignation provided access to more money in the 401(k) and with no restrictions as to what he did with it. In addition, his new job was temporary at the time, paid significantly less than KSM, and Resch did not discuss other work with Oechsner, and said nothing to indicate abandonment of employment to Oechsner. Also, like Bannenberg, Resch sent word to KSM when the strike ended that he wanted to be reinstated by completing KSM's questionnaire in October 1997. All of this rebuts Respondent's theory that when he resigned he was abandoning his employment. The fact that Resch stopped taking strike pay from the Union after he resigned is of little or no consequence. Such benefits are commonly provided to those needing the money most, and an employee with interim employment, and having just received 401(k) funds might well believe, as Resch testified that the union's "money could have been used for better things." The claim that when Resch resigned to obtain access to his 401(k) he intended to abandon his employment with KSM is unproven.

V. ROBERT HANRAHAN

Robert Hanrahan worked for KSM for about 10 years and worked in the paint department at the time of the strike. As discussed, supra, he had previously withdrawn all available money from his 401(k) through a May 1996 hardship withdrawal. In April 1997 Hanrahan was behind on his mortgage and received correspondence from attorneys for his home loan mortgage company threatening him with foreclosure. Hanrahan called Oechsner to talk to him about obtaining additional money from the 401(k), and he told Oechsner about the threat of foreclosure.[25] Oechsner told Hanrahan that "the only way he would be able to approve any money out of my 401(k) is if I quit." Hanrahan asked Oechsner if he was sure there was no other way "without quitting my job because I really didn't want to do that." But Oechsner told him "that's the only way you're going to get your money." Hanrahan asked him whether he could obtain some of his vacation, as he believed he had 120 hours due him. Hanrahan testified that Oechsner said that "if I quit he'd send me the money but that was the only way he would give me the money." Hanrahan talked things over with his wife and they decided that "we had no choice, that we had to—we couldn't get thrown out of the house so I decided to write a letter to Mr. Oechsner because he told me he needed it in writing when I talked to him on the phone. So I wrote a letter resigning from KSM Industries." The letter stated:

> David Oechsner,
>
> You have informed me that in order to receive my vacation pay, and 401(k) money, I have to quit my job at KSM Indus.

[24] Resch did not see this handwriting added to the form but it was on there when he signed it and he testified, "I would have to say it looks like my wife's." Resch's wife filled out the remainder of the form (with the exception of Resch's signature), and I agree, the handwriting looks very similar. Respondent did not suggest that Oechsner or anyone at the company wrote the note. I find that Resch's wife wrote the legend, and it is corroborative of Resch's testimony.

[25] I judged Hanrahan to be an excellent witness: honest, straightforward, with no tendency for exaggeration or hyperbole. In addition, his testimony was not disputed. I credit his testimony.

Because of my financial situation, I am quitting my job at KSM Indus.

Thank you

/s/ Bob Hanrahan

Although Hanrahan did not talk about it a lot on the picket line, those he talked with told him not to quit: "Well they all told me don't quit, but I was losing my house. I had no choice. I had to quit to get my money."

Hanrahan received his vacation pay and the balance of his 401(k) account, which was $8,813.38.

After resigning, Hanrahan continued to picket with the Union until the end of the strike, although less so over time as his interim employment conflicted with time for picketing. He obtained a job elsewhere by the end of the strike but testified that he was earning significantly less money, and the conditions on insurance at the interim employer, which limited treatment for preexisting conditions for 1 year were a concern to him because of his health conditions. Hanrahan testified that he would have returned to work at KSM if he had been offered recall at that time.

Hanrahan testified that Oechsner did not tell him there was any other way to get money from his 401(k) without resigning. I note that the weight of the evidence suggests that there was nothing inaccurate about this. As Oechsner testified, having taken a hardship withdrawal within the previous 12 months, in May 1996, Hanrahan was barred in April 1997 (by the terms of the plan and by applicable IRS rules governing the plan's qualification status) from receiving another hardship withdrawal within the 12 month period. It was not, however, just a matter of waiting another month. In May 1996 Hanrahan had taken a distribution of the entire employee contribution portion of the account. As a recipient of a hardship distribution he had been prohibited from further contributing for 12 months. Thus, even after the 12 month period had passed there would be no funds available for a hardship distribution. However, by terminating, Hanrahan was eligible to receive the entire account, consisting of employer contributions, contributions rolled over from the prior profitsharing, and earnings on contributions.

With regard to Oechsner's linking of resignation to receipt of vacation pay, there is no charitable interpretation. Hanrahan's account of his conversation with Oechsner was not disputed by Oechsner. Indeed, it is explicitly corroborated by Hanrahan's contemporaneous letter of resignation, in which he attributed to Oechsner the assertion "[y]ou have informed me that in order to receive my vacation pay, and 401(k) money, I have to quit my job at KSM Indus." That Oechsner made this statement to Hanrahan was not disputed.[26] The handwritten notes on the letter indicate that Hanrahan was, in fact, paid 120 hours vacation pay, the full yearly amount owed to an employee of his seniority. As Oechsner explained the vacation pay policy, Hanrahan, who had earned 120 hours of vacation pay on his anniversary date of December 7, 1996, should have been able to ask for and receive that money at any time during the strike. Oechsner misled Hanrahan in an effort to encourage him to resign. Hanrahan did resign, explicitly, as stated in his resignation letter, "[b]ecause of my financial situation." Hanrahan's resignation letter strongly corroborates his testimony in which he explained that he felt that he "had no choice. I had to quit to get my money." I cannot determine whether Hanrahan would have resigned if he had not been misled by Oechsner regarding the necessity to resign in order to obtain vacation pay.[27] "[A]ny uncertainty in this regard" is held "against the Respondent, the wrongdoer here." *Alaska Pulp*, supra at 525. Against this is essentially no evidence that Hanrahan intended to abandon his job and not return if recalled. The interim employment he subsequently secured paid less than KSM, and for a 1 year period did not cover Hanrahan's serious health conditions. Hanrahan testified that he would have returned to work at KSM if he had been offered recall at that time. After his resignation he continued picketing as his interim employment permitted. Nothing Hanrahan said or did indicates abandonment of employment with KSM at the time of his resignation.[28]

b. Poststrike resignations

I. ROGER DAY

Roger Day was the local union president during the strike and an employee of KSM since 1978. He was a painter at the time of the strike. At the conclusion of the strike Day and his wife[29] found themselves behind in their bills. In an effort to ameliorate the situation they decided to withdraw money from his KSM 401(k). Day told his wife that he had to quit in order to receive his 401(k) funds. Day's wife testified that "we discussed it that he had to resign because we needed his 401(k) money. That was the only way we could get it." She testified that Day resigned "[s]o we could get his—receive his 401(k) money to obtain the 401(k) funds."

On October 10, 1997, Day called and left a voice-mail message at KSM stating he was resigning and requesting a withdrawal from his 401(k) fund. Within minutes, Day's son, Jason, who also worked at KSM, called and left a similar message also resigning from employment at KSM. According to Day's widow, Day's son quit "[b]ecause his dad did. That's why he quit."

That same day, October 10, Oechsner sent Day a confirming letter enclosing the 401(k) distribution forms he and his wife needed to fill out.[30] He received a disbursement from his 401(k) that month.

[26] I have previously discredited the generalized denial offered by Oechsner to the effect that no employee had to quit their job in order to obtain their vacation pay.

[27] See, *MCC Pacific Valves*, 244 NLRB 931 (1979) (finding 8(a)(3) violation and, most pertinently, ordering reinstatement and backpay where employee required to sign termination slip in order to receive already earned vacation pay).

[28] As referenced, supra, Respondent's argument that Hanrahan (and other resignees) failure to contact KSM and express interest in returning to work shows abandonment is at odds with Board precedent. *Zimmerman*, supra; *Sunol Valley Golf & Recreation Co.*, supra; *Alaska Pulp*, supra at 528.

[29] Roger Day died in December 1999. At the hearing his widow, Michelle Day, offered all of the testimony regarding Day's resignation.

[30] Oechsner's inclusion of those forms (and reference to them in his letter) suggest, and I find, that Day requested them in the phone message in which he resigned.

Around this time, perhaps on October 5, but in any event within a few days of his resignation from KSM, Day resigned as president of the local union, a position in which he was serving a second term. His wife had no explanation for this timing, but said that Day resigned as local union president because he began working at a nonunion plant operated by his interim employer (he worked for this employer since early 1997), and when the employer learned of his union presidency he was told he had to resign as local union president or resign the interim job.

Day worked at that job performing work similar to that performed at KSM and earning slightly more money than at KSM. In the first few months of 1998, Day left that job to work as a painter in a supervisory capacity at another employer. At this job he was a salaried employee and earned still more money but worked more hours.

I think that the weight of the evidence demonstrates that Day unequivocally intended to abandon his employment at KSM at the time he resigned. I accept his wife's testimony that he was motivated to resign in order to obtain 401(k) funds, however this does not negate the evidence that he was intending to leave KSM behind for good when he resigned. It is only a small point that General Counsel tried but could not elicit testimony clearly stating that Day would not have resigned but for his need for 401(k) funds. There is also the fact that Day had obtained employment similar to his KSM job and that it paid more than KSM paid. This is certainly not dispositive of Day's intention but it lends context to two other pieces of evidence that suggest Day's intention. First, Day's resignation from KSM was mirrored by a contemporaneous resignation from the position as union president. The two resignations occurred within days of each other, and within days of the end of the strike, indeed, the resignation of union presidency was conveyed to KSM at the time the unconditional offer was made to KSM. This relinquishment of authority over and involvement in the union Day had headed throughout the strike strongly suggests that with his resignation from KSM Day was intending to drop the encumbrances of the job for good. He was divesting himself of KSM-related responsibilities and it strikes me as highly unlikely that a union president that had led his union through a strike that concluded without a contract, would, *at the same time*, resign from employment and resign his presidency, but intend to return to employment with his employer, and this is especially unlikely when the employee has found alternative more highly compensated employment. He certainly did not need to resign from the union presidency in order to receive his 401(k) funds.[31] In addition and even more probative, Day's resignation was followed—by minutes—by the resignation of his son from employment with KSM. Day's son quit, "[b]ecause his dad did." The General Counsel essentially concedes that Day's son abandoned employment with his resignation and did not intend to return to KSM. His alleged backpay period ends with his resignation. However, this act of familial solidarity with his father makes no sense if Day intended to return to work at KSM.

As discussed herein, I agree with the General Counsel that KSM's liability for the failure to reinstate strikers begins when the strike ended, not a week later. However, by the time of Day's resignation, October 10, Day and the employees could not have known that reinstatements of many employees would be unlawfully delayed for months and in some cases for years. This realization developed over time, and in time, may well have contributed to an employee's willingness to resign to obtain access to benefits funds. But not on October 10. I find that when Day resigned employment at the end of the strike, he intended to permanently sever his employment relationship with KSM.[32] Accordingly his backpay period is October 5 through 10, 1997.[33]

II. MICHAEL BARTELT

Michael Bartelt worked at KSM since 1985 and was working in the welding department at the commencement of the strike. In October 1997 Bartelt contacted Oechsner over the phone in an effort to get a loan from his 401(k) funds. Bartelt had outstanding bills and his home was threatened with foreclosure. Oechsner testified that he inquired as to why Bartelt sought the funds but that Bartelt refused to tell him.[34] Oechsner told

[31] Michele Day testified that her husband resigned as local union president under pressure from his interim employer who threatened him with job loss if he did not. This patently illegal demand may well have occurred, and Day may well have conveyed it to his wife. Yet, still, the timing of the resignation, right as the strike at KSM ended, after an employment relationship with the interim employer that had begun 10 months prior, even before the strike began (R. Exh. 11), is hard to accept as coincidental. It is hard to imagine that, had Day wanted to remain at KSM, he would not have resisted this illegal demand in some fashion, or, at least, that there would be some objective evidence of his motive. I note that no other witness testified as to the reason Day gave for resigning his union presidency. Presumably his decision to resign as union president was discussed with others in the Union.

[32] At the hearing, Respondent raised hearsay objections to Michelle Day's testimony. I took the evidence and reserved ruling on Respondent's hearsay objections. I agree with the General Counsel that *much* of Michelle Day's testimony regarding Roger Day's state of mind is relevant and an exception to the hearsay rule pursuant to Federal Rule of Evidence 803(3). I assume without deciding that the hearsay objections should be overruled in their entirety and I have considered Michelle Day's testimony entire testimony. Notwithstanding this, in terms of weight I note that her testimony presented problems that, in fact, validate the Federal Rules of Evidence's hesitancy about second-hand testimony. I believe that Michelle Day testified honestly, to the best of her ability, but there was much she did not know and misstated. She was unaware that her husband applied to work at Maysteel even before the strike began. She was uncertain about whether and how long employees at Maysteel had to wait for insurance, and whether Roger Day took insurance there. I believe that her explanation about Roger Day's decision to step down as local union president was inadequate (not by intention but due to the limits of her knowledge of his decision) and that others could have, but did not, offer more explanation of that decision.

[33] Given his interim earnings during this period, my findings result in a very limited total backpay award for Day. Pursuant to the General Counsel's unchallenged alternate calculation, Gordon Sabel's backpay period is set at October 10, 1997, to April 17, 2001.

[34] Bartelt testified that he told Oechsner that he needed the money to avoid a foreclosure, but that Oechsner made no reference to hardship withdrawals. Bartelt's recollection is at odds with Oechsner's conduct with other employees. As I have said, I believe that Oechsner was

Bartelt that in order to get his 401(k) money he would "have to come in and sign a quit slip." Bartelt said that "all I wanted to do was borrow a loan." Oechsner reiterated "that I should come in, sign a quit slip and I could get the 401." Bartelt went to KSM and met with Oechsner on October 14, 1997.

Oechsner had prepared a resignation statement. Bartelt testified, "[w]e sat at the table and he said, well, here's your resignation paper. Sign it and then I could get the 401." Bartelt signed the resignation. After he signed it, Bartelt also asked about whether he could get his vacation pay. "He said no because I signed this piece of paper."

Bartelt had determined that the 401(k) at his new employer, Super Steel, permitted loans, so he had Oechsner fill out the distribution forms to reflect his desire to roll over his KSM 401(k) funds to the Super Steel 401(k), thus permitting Bartelt to take a loan only for the amount of money he needed. Bartelt testified that the only reason he resigned was to obtain the 401(k) money he needed to avoid a foreclosure. However, later in the evening of the very day he resigned, Bartelt met with his parents who offered to loan him the money to pay off his bills and keep the house out of foreclosure. As a result, Bartelt no longer required funds from his 401(k) and he left his funds in the KSM 401(k) for nearly 4 years before rolling it over into the Super Steel plan. After learning that his parents were willing to loan him the necessary funds, Bartelt made no effort to contact KSM to rescind or otherwise withdraw his resignation, or to tell Oechsner that he suddenly did not need the KSM 401(k) funds. However, according to Bartelt, "if my parents would have loaned me the money sooner I would have never signed the quit slip to get it."

Bartelt had begun working at Super Steel on February 24, 1997, during the strike, and was earning a higher hourly pay rate than at KSM. He received a 50-cent-per-hour raise in September. After he took the job at Super Steel he declined further strike benefits, as he felt that he was contributing less to the strike. He continued to do some picketing until about June 1997. In September 2001 Bartelt came to KSM a final time to turn in forms to rollover his KSM 401(k) funds to the Super Steel 401(k). On those forms he listed his date of termination from KSM as February 24, 1997, the date he began employment with Super Steel.

The evaluation of Bartelt's resignation is complicated. I accept that the afternoon that Bartelt resigned he did it in order to obtain money he needed for financial reasons, and would not have done it otherwise. He did not approach Oechsner seeking to quit, but rather, seeking a loan. His resignation was at Oechsner's repeated suggestion, and Oechsner did not offer him any alternatives. But just a few hours later, that day, the need for the 401(k) money was obviated when his parents offered to loan him the funds he needed. By Bartelt's own admission (and by his conduct in leaving freely available 401(k) money with KSM for four years) at that point he did not need the 401(k) funds and the resignation was unnecessary. In evaluating Bartelt's intentions it is notable that, having resigned to obtain his 401(k) funds and then finding out within hours that he did not need the 401(k) funds, that he did not attempt to change course. It is very possible, of course, that if, the morning after, Bartlett had contacted Oechsner and asked to rescind the resignation, that Oechsner would have refused. Oechsner's enthusiasm for resignations has previously been noted. But the attempt would have been probative. In this regard, Bartelt is in a category of one. Every other employee who the General Counsel alleges resigned to obtain funds needed to use the funds, and hence *could not* attempt to rescind their resignation without calling into question the receipt of funds. But in Bartelt's case, there was nothing to lose by attempting to rescind the resignation as the need to resign for any reason other than to sever employment disappeared the same day that he resigned. Although Board precedent requires an employer to seek out former strikers and offer them reinstatement (and not to presume abandonment), in this instance, one might expect to see *some* effort to reverse course by an employee who desires reinstatement. On the other hand, one must not lose sight of the peculiarity of the legal test the Board has developed. An employee with no interest in resigning, who only does so to obtain retirement benefits, may well have every desire to return to employment but believe—in a sentiment that Respondent would likely endorse as a logical and clear legal standard—that having resigned, he has necessarily abandoned his employment. He therefore will proceed to act in accordance with that belief. Such an employee, unschooled in the often unintuitive world of Board precedent might well demonstrate unequivocal intent to abandon his employment but only because he believes that a finding that he abandoned his job necessarily follows from his resignation. That may well be the explanation for Bartelt's inaction in the face of his parent's help and alleviation of his need to have resigned. Of course, it probably also helped that at the time Bartelt resigned he was working at a steel plant earning more money than he had at KSM. There is some suggestion of this in Bartelt's view, expressed in 2001 when he filled out his 401(k) forms to reflect a termination from employment at KSM of February 24, 1997, the day he began working for Super Steel during the strike. This is indicative of his mindset and intent, at least as of the day he signed the forms. But whether because he wanted to, or believed he had to, if the record was confined to the above evidence, it might suggest that when Bartelt resigned (at Oechsner's suggestion) he left KSM behind for good. However, there is other pertinent evidence.

The General Counsel contends that Bartelt's continued interest in employment with KSM after his resignation is indicated by the testimony that he returned to the facility, after he heard from Malson that KSM vice-president Davis was interested in talking to him about coming back to work. Bartelt testified that he talked with Davis and agreed to meet Davis at the facility but that when he showed up, another KSM top manager, "Bill James came walking out and said, 'We're not hiring you back. You're going to have to leave.'" None of Respondent's witnesses—neither James who testified, nor Davis, who did not—

quite willing to encourage employees to resign, but his pattern of conduct (for the most part undisputed) included explaining the hardship withdrawal options to employees who might qualify and inquiring about the reason they were seeking the money. I accept Oechsner's recollection of his conversation with Bartelt because it is consistent with Oechsner's conduct generally.

disputed this incident. However, in conflict with the General Counsel's theory, Bartelt insisted—four times, and no matter how the General Counsel approached the question—that this incident occurred before his October 14, 1997 resignation, that is, "before I met with Oechsner." This testimony notwithstanding, there is, as General Counsel contends, reason to believe that Bartelt's recollection is wrong. Malson testified that it was the summer of 1998 when Phil Davis approached him and asked him to get in touch with Bartelt, because KSM was interested in having Bartelt come back for welding. Malson recalls that the incident occurred after his own April 1998 recall, something he would not likely confuse, and I credit his testimony which was presented with a unembellished certainty that was entirely convincing. In addition, this was at a time when Oechsner described the demand for employees as expanding. Notably, according to the records, by May 1998 Bartelt was the only welding department former striker who had not resigned or been offered recall. Thus, it makes senses that Davis would come looking for him at that point. It makes very little sense that KSM would come looking for Bartelt in the 2 weeks after the strike ended, when there were 10 other unreinstated welders and KSM's position was that Bartelt had resigned. Moreover, upon entering the facility, Bartelt recalls seeing Roger, a shipping employee, whose surname he thought to be Gutjahr. In fact, Roger Gutjahr is the only "Roger" in shipping and, in fact, he was reinstated June 15, 1998. In sum, I think the evidence is compelling that Bartelt was mistaken in his testimony and that Bartelt returned to KSM to meet with Davis in the summer of 1998. Notably, KSM offered neither James nor Davis to testify on this point (or, as noted, on the meeting at all). The fact that Davis called Bartelt in the summer of 1998 is less significant than the fact that Bartelt went there to meet him for the purpose of seeing if he could be recalled to work. That shows, at a minimum, in an objective fashion, that Bartelt retained an interest in returning to KSM. Given that the question is "whether the striker has expressed an unequivocal intention not to return to his former job," Bartelt's objective manifestation of interest in returning to his job 8–10 months after his resignation—a resignation suggested by Oechsner—renders the evidence suggesting an intent to abandon his job equivocal. Accordingly, based on all the relevant circumstances, I find that Respondent has not met its burden of proving that Bartelt abandoned his job with KSM when he resigned in order to enable him to obtain access to his 401(k).

III. THE UNION AND GENERAL COUNSEL'S CLAIMS THAT GRAF, CURTIS, WIEDEMAN, AND KUHLENBECK WERE DISCHARGED

Before considering the status of the four remaining resignees, it is appropriate to discuss a legal contention that the Union and General Counsel assert is generally applicable to each. The remaining resignees—Graf, Curtis, Wiedeman, and Kuhlenbeck—resigned weeks or even months after the strike ended. Contending that the failure to offer them reinstatement earlier was unlawful, the General Counsel claims on brief that "[w]hen an employer violates Section 8(a)(3) by failing to recall strikers, and this delay causes the strikers to have to resign, such resignations are ineffective, because they are viewed as constructive discharges." (GC Br. at 96). More sweepingly, the Union contends that the unlawful failure to reinstate an unfair labor practice striker is "effectively" a discharge and that "[i]t follows that subsequent resignations do not extinguish employees' right to recall." (Union Br. at 23). The General Counsel and the Union cite the same cases in support of their contentions: *Big Sky Metal Co.,* 266 NLRB 21 (1983), *Roman Iron Works, Inc*., 292 NLRB 1292 (1989), and *C. K. Smith & Co.*, Inc., 227 NLRB 1061 (1974), enfd. 569 F.2d 162 (1st Cir. 1977).

I reject these arguments, at least as framed. The Board could, but does not, equate an unlawful failure to reinstate a striker with a discharge, and more to the point, takes the view that an unreinstated striker—unlike an unlawfully discharged employee—can abandon employment, and thereby waive further backpay and reinstatement. *Zimmerman Plumbing and Heating Co.*, 334 NLRB 586, 588 (2001). Notably, *Big Sky Metal* concerned an actual, not a constructive discharge, and a finding that the unlawful discharge in that case led to the discriminatee's subsequent decision to resign in order to receive pension payments. *Roman Iron Works* does not suggest that an unlawful failure to reinstate a striker is a discharge. Nor does the case demonstrate that a striker unlawfully denied reinstatement *cannot* be proven to have abandoned employment. In *C.K. Smith & Co.* the Board adopted the view that the resignation of an unreinstated striker was "similar to a constructive discharge," but did so in circumstances where the unreinstated striker's resignation was found to be "necessary in order to secure other employment." In short, while an employer's unlawful failure to reinstate strikers may provide a further motive for the resignation that bolsters the case against a finding of abandonment, the unlawful conduct does not "establish[ ] per se that none of the strikers intended to sever their employment by resigning to obtain their pension funds." *Alaska Pulp*, supra at 525 fn. 17.[35]

With that said, an unlawful delay in reinstatement is, in many instances, an important factor in evaluating whether an employee intended to abandon employment when he resigned. In *Alaska Pulp*, supra at 524–525, the Board majority found that an unlawful delay in reinstatement of just 2 weeks left the Board "unable to determine, under the subjective standards set forth in *Augusta Bakery*, whether the strikers unequivocally intended to abandon their prestrike or substantially equivalent positions because the Respondent's refusal to offer full and timely reinstatement so tainted the atmosphere in which they resigned." *Alaska Pulp*, supra at 525 fn. 17. The Board found that in the absence of such unfair labor practices the employee "may have made a different choice regarding resignation. We will hold any uncertainty in this regard against the Respondent, the wrongdoer here." *Alaska Pulp*, supra at 525. The Court of

[35] I note that the General Counsel does not assert that employees Day or Bartelt, who resigned a few days after the strike ended, were constructively discharged or motivated to resign by Respondent's failure to immediately reinstate them. It is unclear if the Union is contending that Day and Bartelt were discharged, but if so, I reject the argument for the reasons I reject it for the other employees. I further note that the compliance specification does not allege that any of the strikers were discharged (constructively or otherwise). I reject the Union and the General Counsel's claim for that reason as well.

Appeals did not enforce the Board's order in *Alaska Pulp* on this point, but it remains Board precedent. See also, *Roman Iron Works, Inc*., 292 NLRB at 1301–1302 (application for and receipt of pension benefits by strikers whom employer had unlawfully failed to reinstate does not demonstrate intent to abandon employment, as failure to reinstate was "a material factor in creating the confusion that exists now as to whether they would have returned [earlier]. It is well settled that where a party's conduct results in an ambiguity, the ambiguity is not to be resolved in its favor"). The upshot is, that while the unlawful failure to reinstate a striker does not amount to a discharge, the Board has recognized that it complicates and therefore renders more difficult an employer's effort to meet its burden to prove that an unreinstated striker has abandoned his employment. There is no per se or irrebuttable rule. The specific facts must be examined in each case. But if the unlawful failure to reinstate makes the Board unable to determine whether the striker would have made the same choice to resign in the absence of the unfair labor practices, the uncertainty must be resolved in the discriminatee's favor.

I now return to consideration of the status of the four remaining resignees.

IV. ROBERT GRAF

Robert Graf worked for KSM since 1984. He was a spot welder at the time the strike began. During the strike, in January or February of 1997, while in the picket trailer, he heard Allen Resch telling Roger Day about having to quit to collect his 401(k) account. On another occasion he heard Anthony Bannenberg in the strike trailer saying that he had to quit to obtain his 401(k).[36] As referenced, supra, the strike ended on October 5 with the Union's unconditional offer to return to work. Graf was not recalled. Graf stopped by Oechsner's office late in the afternoon of October 28, 1997, and told Oechsner that he needed to quit. Oechsner asked him why, and Graf told him that he needed his 401(k) funds. When Oechsner asked him what he needed the money for, Graf would not discuss it with him. Oechsner told him that if there was no basis to release the money for any hardship reasons Graf would have to write out a quit slip in order to receive the money. Graf did so. Immediately afterwards, Oechsner provided Graf with the paperwork for the 401(k). The distribution paperwork was filled out in the office and Oechsner mailed the papers to Strong. Graf received a check in the mail for approximately $7,822.67 within a few weeks, in November.

Graf testified that the reason he resigned was because he needed the 401(k) money "to set my debts straight." He testified that if he had not needed the money he would not have resigned from KSM. He testified that it was his belief that had he been called back to work immediately after the strike he would not have needed to resign because he would have been making more money at KSM than he was with his interim employer. Although working at Mayville Engineering, Graf picketed with the union until the strike ended.

Oechsner testified it was his understanding that most of the strikers had found work "somewhere or other." He recalls Graf specifically telling him that he had a job and something to the effect that "it was simply time for him to move on." When Graf resigned, he was working at Mayville Engineering making significantly less (about $3.69 less) an hour.

In Graf's case, his unrebutted testimony (and credited) testimony is that he told Oechsner that he was quitting to obtain his 401(k) funds, which, of course, provides contemporaneous support for Graf's assertions that this was his motive. Oechsner's testimony that Graf told him, in the course of resigning, something to the effect that "it was simply time for him to move on," was also unrebutted, and I credit Oechsner's assertion that it was said. This statement supports Respondent's claim that Graf intended to abandon his employment. However, I do not think this one solitary statement, made in the course of a meeting with Oechsner in which Graf expressly explained his purpose for resigning is adequate to conclude that Respondent has proven that Graf abandoned his employment. The other job that Graf was "moving on" to paid significantly less than KSM and he had not resigned at anytime during the strike although already working at this interim employer. He resigned when, and because, he needed funds from his 401(k).

In addition, with Graf's resignation on October 28 another factor comes into play that, in my judgment, would not apply to the resignees previously considered. By October 28, more than 3 weeks after the end of the strike, Respondent had begun to reinstate a few of the strikers. Graf was not among those offered reinstatement. As discussed below, the delay in Graf's reinstatement was unlawful. This fact alone undercuts the contention that Graf's right to reinstatement was affected by his resignation. In *Alaska Pulp*, supra at 524–525, the Board majority found that an unlawful delay in reinstatement of just 2 weeks left the Board "unable to determine, under the subjective standards set forth in *Augusta Bakery*, whether the strikers unequivocally intended to abandon their prestrike or substantially equivalent positions because the Respondent's refusal to offer full and timely reinstatement so tainted the atmosphere in which they resigned." *Alaska Pulp*, supra at 525 fn. 17. The Board found that in the absence of such unfair labor practices the employee "may have made a different choice regarding resignation. We will hold any uncertainty in this regard against the Respondent, the wrongdoer here." *Alaska Pulp*, supra at 525. The court of appeals did not enforce the Board's order in *Alaska Pulp* on this point, but it remains Board precedent. See also, *Roman Iron Works, Inc*., 292 NLRB at 1301–1302 (application for and receipt of pension benefits by strikers whom employer had unlawfully failed to reinstate does not demonstrate intent to abandon employment, as failure to reinstate was "a material factor in creating the confusion that exists now as to whether they would have returned [earlier]. It is well settled that where a party's conduct results in an ambiguity, the ambiguity is not to be resolved in its favor").

In this case, any uncertainty weighs heavily in Graf's favor here, as Graf was earning significantly less at his interim employer and was driven to resign when he did based on financial

[36] I overruled Respondent's hearsay objection to testimony regarding these conversations. They were not offered, nor relied upon for the truth of the matters asserted. That Graf heard such statements is relevant to testimony about his subsequent actions with regard to his 401(k).

circumstances that, objectively, would have been mitigated had he been recalled to KSM at the conclusion of the strike. Indeed, given that Graf's credited testimony directly links his economic circumstances to a lower paid job, and his resignation to his economic circumstances, I believe that the evidence does not create uncertainty, but affirmative evidence in support of the General Counsel's claim that Graf did not intend to abandon employment when he resigned. Respondent has failed to meet its burden of demonstrating that the resignation amounted to abandonment.

V. ALLEN CURTIS

Allen Curtis began working for KSM in 1988. At the time of the strike he was working as a painter. Curtis picketed throughout the strike even while he worked various interim jobs. When the strike ended Curtis was not recalled and on December he contacted Oechsner to try to take a loan out on his 401(k). Oechsner told him to come in to see him. Once there, Oechsner explained that the plan did not permit loans and he explained the three conditions under which an employee could make withdrawals from the 401(k) plan, which, although Curtis did not recall the word hardship being used, were obviously the conditions for a hardship withdrawal. Curtis did not meet any of these hardship conditions.[37] Oechsner then told Curtis that in order to get the funds he would have to quit. Curtis told him that he did not want to quit, but Oechsner reiterated that that was the only way to get the 401(k) funds. Curtis finally said he would have to "quit for financial reasons, but I was quitting under protest." Curtis wrote out a termination letter that stated:

> To Dave
>
> I Allen Curtis have to terminate my employment at K.S.M. Industries on 12.15.97 because of financial reasons.
>
> Signed Allen M. Curtis

Curtis subsequently brought information to Strong so that the rollover of his 401(k) to his new employer could be arranged. For reasons unexplained in the record, the rollover distribution form was not signed by Oechsner until March 5, 1998, and thereafter Curtis took a loan for the amount he needed, which was $7000, as permitted by the new employer's plan.

Curtis testified that he did not want to terminate his employment on December 15, 1997, but did so because it was the only way to gain access to his 401(k) funds. His new job paid less, and instead of doing painting work that "loved" as he had KSM, he did shearing work at the new employer. He testified that the shearing work was "not ideal" because of his "back situation." Curtis testified that if offered recall to KSM on October 5, "I absolutely would have gone back."

The undisputed evidence is that Curtis resigned "under protest" in order to obtain access to his 401(k) account after Oechsner told him that the plan did not permit loans and that he did not qualify for a hardship withdrawal. Curtis' letter of resignation reflected that he was resigning because of "financial reasons." Indeed, the letter stated that "because of financial reasons" that Curtis felt that "I have to terminate my employment at K.S.M Industries." Objectively, at the time of his resignation Curtis' interim employment was not satisfactory. It placed physical demands on him unlike his work at KSM. He did not like the type of work he was performing, compared to the painting he did for KSM that he "loved." The interim job did not pay as well as KSM. There is an unexplained delay in Oechsner's signing of the distribution forms for Curtis. The record is unclear whether the delay was the result of inaction by Curtis, Strong, or Oechsner. In any event, there is no evidence of an unequivocal intent by Curtis not to return to KSM. To the contrary, the evidence suggests that he resigned only to obtain needed funds.

Respondent has failed to meet its burden of showing that Curtis abandoned his employment with KSM at the time he resigned. In addition, as discussed with regard to Graf, the unlawful delay in Curtis's reinstatement creates uncertainty as to whether he would have resigned in the absence of the unlawful failure to reinstate him. This uncertainty must be held against Respondent, and therefore, defeats Respondent's effort to prove Curtis abandoned his job by resigning. *Alaska Pulp*, supra.[38]

VI. DOUGLAS WIEDEMAN

Douglas Wiedeman began working at KSM in 1989. At the time of the strike he worked in stockroom and receiving. After the strike, Wiedeman was not recalled until 2004. In January 1998 Wiedeman, still not recalled to work, contacted Oechsner because he needed his 401(k) funds.[39] At the time Wiedeman was working at Alverno College and earning about $3 dollars less an hour than he had at KSM. His wife at the time (now his ex-wife) took care of bills for the household and told him that they needed the 401(k) funds. Wiedeman contacted Oechsner by phone and Oechsner told him that to get the 401(k) funds he would have to quit. Oechsner did not ask him what he needed the money for and did not ask him to come in to discuss it. Wiedeman told him that "I guess I'll have to quit." Oechsner said he would need written notice. Wiedeman's wife wrote out a termination note dated January 30, 1998, and asked that the 401(k) distribution forms be sent directly to their home. Wiedeman signed it and his wife mailed it to Oechsner a few days later. Wiedeman testified that he did so because he needed his 401(k). He testified that he would not have resigned if there was another way to get the 401(k) money. He also

[37] Oechsner recalled that Curtis told him he needed the funds to get married. Curtis denied this, and said that telling Oechsner he was getting married was something he mentioned late in their meeting and was unrelated to his desire for his 401(k) funds. I credit Curtis' explanation. I think this was a misunderstanding as opposed to a meaningful contradiction in the testimony.

[38] Respondent contends (R. Brief at 32–33) that the fact that Curtis rolled over his 401(k) to his interim employer's plan, and then took a loan (permitted by the new employer's plan) in the amount of funds he needed, proves that Curtis did not have a financial need for the money. That does not follow. Especially given the tax liabilities incurred by a distribution, in addition to the benefits of keeping money in a 401(k), it makes perfect sense that an employee would arrange to take cash receipt of as little as necessary. That is what Curtis did. It does not undercut his testimony that he needed funds from his 401(k).

[39] Wiedeman's account of these conversations was not challenged. I credit his testimony.

testified that if he had been recalled to KSM on October 5, 1997, he would not have needed to resign. At the time he spoke to Oechsner he did not tell Oechsner that he had another job. Ultimately, Wiedeman was recalled to KSM in February 2004, as a result of what Oechsner called "our discussions with the NLRB on compliance."

The evidence shows that Wiedeman contacted KSM seeking his 401(k) funds and Oechsner told him he would have to quit to obtain the funds. Wiedeman told Oechsner "I guess I'll have to quit." His conversation with Oechsner corroborates his testimony that he resigned in order to obtain his 401(k) funds and would not have resigned if he had another way to obtain the money.[40] At the time he spoke with Oechsner he did not tell Oechsner that he had another job. He did, but it paid approximately $3 dollars an hour less than what his job at KSM paid. As noted, I credit Wiedeman's (undisputed) testimony. Respondent has offered no evidence demonstrating that Wiedeman intended to abandon his employment when he resigned. Indeed, the fact that he accepted KSM's recall when it finally came in 2004 suggests that Wiedeman had not abandoned his employment. See, *Zimmerman Plumbing and Heating Co.*, 339 NLRB at 1311. I find that Respondent has not demonstrated that Wiedeman abandoned his employment when he resigned in January 1998.[41]

VII. RICHARD KUHLENBECK

Richard Kuhlenbeck began employment with KSM in 1978. At the time of the strike he was working as a tape operator. He was not recalled after the strike ended on October 5. Late in October he contacted Oechsner to find out if he was allowed to withdraw a portion of his 401(k). Oechsner set up a meeting with him that week in his office. This meeting took place in November 1997. Kuhlenbeck told Oechsner that "I was going through a divorce at the time, and my house was in foreclosure pending auction," and that "I needed the money for a security of deposit and first month's rent on a new residence." Oechsner helped Kuhlenbeck fill out the forms to make a hardship withdrawal from his 401(k) and Kuhlenbeck withdrew funds from the 401(k), using it for a security deposit and first month's rent on his new residence.

In November 1998, still not recalled to KSM, Kuhlenbeck contacted Oechsner again to see if he could make a further withdrawal from his 401(k). They met in Oechsner's office on November 16, 1998. Kuhlenbeck told Oechsner about his financial problems, which included back rent that was due and utility bills. Oechsner told Kuhlenbeck that there were no funds available for a hardship withdrawal because he had taken out all available funds when took the hardship distribution in 1997. Oechsner told him that he would not be able to withdraw any more of the 401(k) unless he terminated his employment. Kuhlenbeck told him that he did not want to terminate from KSM. However, Kuhlenbeck said that he needed the money and by the end of the conversation he signed a termination notice typed up by Oechsner while they were in the meeting. During this meeting, Oechsner also filled out the 401(k) distribution forms with Kuhlenbeck. Kuhlenbeck subsequently received his 401(k) distribution.

Kuhlenbeck testified that when he went to KSM Industries on November 16, 1998 he did not want to terminate his employment. He also felt that had he been recalled to work after the strike he would not have had to resign in November 1998. At that time he was working at Mayville Engineering for less pay than he had earned at KSM ($3.23 an hour less). He had to travel a farther distance to go to Mayville than to KSM.

On October 6, 2003, Kuhlenbeck accepted recall to KSM. However, on his first day back he was approached by a supervisor, Robert McKinney, who told him "that I was replacing one of his better replacement workers and that I had 30 days to know what I was doing . . . . otherwise he was going to do whatever he could to fire me." After that conversation Kuhlenbeck approached a former employer, General Metal Works, and asked if they would allow him to return to their employ. He was told he could and did, leaving KSM.[42]

Respondent has failed to prove that Kuhlenbeck unequivocally intended not to return to his job at KSM when he resigned. Kuhlenbeck went to Oechsner in November 1998 seeking additional funds from his 401(k). He was not seeking to quit. Indeed, Kuhlenbeck told Oechsner he did not want to quit, but that he needed the money. This corroborates Kuhlenbeck's testimony at trial regarding the motives for his resignation. Generally, the evidence does not show an intent not to return to employment at KSM. The interim employment that Kuhlenbeck obtained paid significantly less than the KSM job, and required a much farther commute (38 miles each way as opposed to 1 mile to KSM). And, of course, it is also signifi-

[40] Respondent complains that Wiedeman did not offer details about why he needed money and therefore did not establish an economic need for the funds. I disagree. The import of his testimony unmistakably, is that he sought access to the funds due to financial exigencies. That he did not detail the particular bills he needed to pay is not particularly probative. It is not surprising that a striking employee earning significantly less from an interim employer would feel financially pressed. KSM offered no evidence to rebut Wiedeman's testimony. As noted, I credit his testimony in this regard. KSM also speculates that Wiedeman may have been eligible for a hardship withdrawal that could have been taken in lieu of resigning to get his 401(k). But KSM offers no evidence to support this speculation, and I reject the suggestion that the General Counsel bears the burden of disproving that an employee had alternatives to resigning to obtain funds. Resigning was the option Wiedeman knew about, and that Oechsner encouraged.

[41] In addition, as discussed below, by the time of Wiedeman's resignation, he had been unlawfully denied reinstatement for 3 months. In the absence of this unlawful conduct by Respondent, Wiedeman would have been working at KSM in August 1998 and "may have made a different choice regarding resignation." Wiedeman thought that would have been the case. Any doubt on this score must be held "against the Respondent, the wrongdoer here." *Alaska Pulp, Corp.*, supra at 524–525. I believe the evidence is sufficient to defeat Respondent's claim that Wiedeman intended to abandon his employment when he resigned. However, alternatively, I would find that the unlawful delay in Wiedeman's reinstatement creates uncertainty about what he would have done if he had been reinstated, and this uncertainty must be held against Respondent.

[42] I found Kuhlenbeck to be a creditable witness. I have credited his account of events. Oechsner's account, which does not contradict Kuhlenbeck's, but adds a few details, is also credited, as reflected in my findings in the text. I note that McKinney did not testify.

cant to the question of whether Kuhlenbeck intended not to return to his job that, in 2003 when he was recalled to KSM, Kuhlenbeck accepted the recall. This strongly supports the view that he had not abandoned his employment when he resigned in 1998 for financial reasons. Of course, McKinney's threat to fire Kuhlenbeck his first day back caused him to reconsider and leave KSM for good, but this does not (in any way) demonstrate that Kuhlenbeck did not return in good faith, or that he had abandoned his job in 1998. In short, the evidence suggests that Kuhlenbeck did not intend to abandon his job when he resigned for financial reasons. This is the opposite of Respondent burden.[43]

C. OTHER DEFENSES TO THE RESIGNEES

In addition to its contention that the resignees abandoned employment, KSM expends significant effort advancing two other, more generalized defenses to paying these individuals backpay. First, Respondent reasserts the substance of its pretrial motion to dismiss, contending that because, as a matter of federal law, regulation, and the 401(k) plan, receipt of their 401(k) funds required their cessation of employment with KSM, the Board may not require KSM to reinstate the resignees or pay them backpay for any period after the resignation. Second, Respondent contends that even if the resignees are found to be eligible for reinstatement, it is inequitable to impose backpay liability on KSM for relying on the employees' resignations.

I. RESPONDENT'S REASSERTED MOTION TO DISMISS

KSM attempted to eliminate the issue regarding backpay and reinstatement for the "401(k)" resignees prior to the hearing with a pretrial motion seeking to dismiss the amended compliance specification with regard to the five discriminatees who tendered resignations prior to the end of the strike (or in one case after the strike but before the General Counsel alleges they should have been reinstated) and to limit the backpay period with regard to five others who tendered resignations after the strike was called off and after the General Counsel claims they should have been reinstated. In its pretrial motion the Respondent contended that, as a matter of law, the employees' who received 401(k) funds upon their resignation *must* be found to have to have severed their employment and could not be eligible for backpay or reinstatement. Respondent contended that pursuant to the terms of the expired labor agreement, pursuant to the terms of the 401(k) plan, and pursuant to the terms of federal law and regulations governing such plans, the only way for the employees to receive their 401(k) money was to resign, and therefore, reasons the Respondent, as these employees received their 401(k) funds, they must have intended to sever and not return to their employment. According to the KSM, if that is not the case and the Board orders reinstatement and backpay for such employees (for any period after the resignation) the Board is requiring the Respondent to violate the terms of the 401(k) plan, the Board is amending the terms and conditions of employment, forcing Respondent to violate its fiduciary obligations under ERISA, and imperiling the tax status of the plan by forcing Respondent to violate federal regulations governing the taxability of 401(k) plans.

At the commencement of the trial in this case, I rejected Respondent's motion, as it is clear that Board precedent on this issue requires development of record evidence with regard to the circumstances surrounding the resignations. However, I invited Respondent to renew its argument in its post-trial brief. Respondent has done so, in a recapitulation of its motion with added alarums regarding the "patent violation of the law," and "legal impossibility" represented by the General Counsel's position. However, I reaffirm my rejection of this argument. Indeed, I think Respondent's contention is irrelevant to the Board's precedents, and specious at core.

My view reflects the fact that the premise of the Board's case law in this area is the finding, or at least the assumption, that the employee received funds, the receipt of which required a resignation. A valid resignation is the starting point of the Board's analysis. Indeed, in *Augusta Bakery*, the Board rejected the precise argument advanced by KSM here—adopting the judge's conclusion that the employer violated the Act by denying the employees reinstatement notwithstanding the argument pressed by the employer "that as pension benefits are payable only when an employee ceases work, the Respondent lawfully denied them reinstatement because they had abandoned their employment." 298 NLRB at 58. There is no issue, as KSM contends, that the resignations were "fictitious" or a "sham" for any purpose, including for purposes of meeting the severance requirements for distribution under the plan, and as required for the plan to maintain preferential tax status under the Internal Revenue Code and Treasury Regulations. As in *Augusta Bakery, Rose Printing*, and all other cases considering this issue, there is no dispute about the fact that the employees resigned, and therefore (and only therefore) were entitled to the retirement, 401(k), or other benefits funds that they received. That is the case here as well: General Counsel not only does not dispute that these employees resigned, but affirmatively pleads it. The Board's concern is not with the veracity of the resignation, but with the circumstances surrounding it. The ultimate issue is whether, apart from the resignations, the employer has shown that the employee had "an unequivocal intention not to return to his former job." *Alaska Pulp*, supra. The Board's precedent is clear that in order for KSM to demonstrate a strikers' abandonment of employment, it must show something

[43] As with the other discriminatees resigning for financial reasons after unlawfully being denied reinstatement, the delay may have added to the pressures on Kuhlenbeck to resign. In this case, KSM concedes, that by November 1998, Kuhlenbeck's reinstatement had been unlawfully delayed for over 1 year, with no hint of when recall would be offered. In the absence of this unlawful delay, Kuhlenbeck "may have made a different choice regarding resignation" and any uncertainty on this score is held "against the Respondent, the wrongdoer here." *Alaska Pulp, Corp.*, supra at 524–525. Kuhlenbeck, for one, testified that he would not have resigned if he had been reinstated after the strike. I believe the evidence is sufficient to defeat KSM's claim that Kuhlenbeck intended to abandon his employment when he resigned. However, alternatively, I would find that the unlawful delay in Kuhlenbeck's reinstatement creates uncertainty as to whether Kuhlenbeck would have resigned in the absence of the unlawful failure to reinstate him and that this uncertainty must be held against Respondent, and therefore, defeats Respondent's effort to prove Kuhlenbeck abandoned his job by resigning.

other than a resignation. If the employer fails to meet its burden then the resignation will not obviate the employer's duty to offer the striker reinstatement and pay backpay for the period that the striker was unlawfully denied the right to reinstatement. In that case, the fact that an employer is ordered to reinstate an employee who was paid retirement benefits is no more a violation of the plan than where a distribution was made after the illegal discharge of an employee. The fact that the employer paid such benefits would not hinder the ability of the Board, or a court to order the reinstatement and backpay for the illegally discharged employee.[44]

In essence, Respondent's contention is no more involved than an effort to pick concepts and terminology from one legal regime and apply them out of context in another different legal regime in an effort to thwart the Board's best sense of meaningful labor policy. Thus, while an employee who resigns and takes a distribution from a tax qualified 401(k) plan may well "cease[ ] to be an employee of the employer" for purposes of the Treasury Regulations governing the tax status of 401(k) plans,[45] the Internal Revenue Code's views on taxability of 401(k) plans does not particularly bear on, much less preclude, the Board's view that for purposes of federal labor policy an employee who resigns and takes 401(k) distribution remains an "employee" of the employer.[46] In cases in which the Board considers the resigned employee to remain an employee under the Act, the Board can, should, and has recognized and considered that employees have resigned precisely so that they can be treated as ex-employees for purposes of the rules surrounding the payment of pensions or 401(k) benefits. But nothing attendant to that compels the Board to ignore the important considerations of federal labor policy that have led the Board to recognize that a resignation by a striker for the purpose of obtaining fringe benefits is not, without more, proof of abandonment of employment.

Notably, 401(k) plans typically, and this one too, provide for an employee's reemployment and continued participation in the plan. See, Article 6.4(g) of the plan. KSM points to nothing in ERISA that suggests that KSM would violate any fiduciary duty if it permitted the reinstatement of an employee (particularly pursuant to the order of a federal agency, enforced by a court) who, pursuant to the plan, had severed employment and taken a distribution. Similarly, KSM points to nothing in the Internal Revenue Code Treasury regulations that suggests that the reinstatement of a former employee, as the Treasury regulations apply that term, would threaten the tax status of the plan. To the contrary, the reemployment and continued participation in a plan is affirmatively permitted by this plan and the case law.

It is also notable that in all its pages of briefing on the subject, Respondent does not cite a single Board case, much less a single federal court case that offers the slightest support for its argument. Thus, Respondent's contention carries the added suspicion of novelty, many years after these issues have been mooted in repeated Board cases ordering reinstatement and backpay for employees who resigned during a strike in order to receive benefits requiring such resignation or retirement. Thus, the argument rises, and falls, entirely on the logic of the argument and, in my view, the argument is not sound, for the reasons I have described.

II. RESPONDENT'S EQUITABLE DEFENSE

Respondent contends that it was entitled to rely on the employees' resignations and thus, even if the resignees are to be reinstated, KSM should not be liable for backpay beyond the date of resignation. KSM asserts that when faced with a resignation by an employee, there was no way for it to know that the General Counsel would subsequently contend that the employee did not intend to abandon employment. Respondent points out that there were numerous employees who resigned, and for whom the General Counsel has not contended further backpay or reinstatement was due. Those resignations, in other words, *did* represent the abandonment of employment by the resigning employees. In essence, KSM asserts that it is unfair to hold it liable for additional backpay when it accepted and relied upon the resignations, and had no way to distinguish resignations that were part of an abandonment of employment from those that were not.

Respondent's contention is answered by the fact that for many years the Board has made clear that in dealing with unrecalled strikers an employer may not presume that a resigning striker intended to abandon employment. As discussed above, Board precedent is clear that the burden is on the employer to demonstrate an employee's unequivocal intent to abandon employment and that a resignation is not adequate. In a strike recall situation, an employer acts at its peril if it assumes that the resignation indicates abandonment of employment. The reasons for this are set out in the Board's case law, discussed supra, and undoubtedly reflect federal labor policy's recognition that the right to strike involves a predictable economic burden on employees that can lead an employee to resign in order to obtain available funds, even when the employee does not intend to abandon employment.

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[44] I note that for purposes of assessing the Board's remedial powers, or, for that matter, of assessing a violation of a benefits plan and relevant employee welfare law and regulations, there is no difference between an employee who resigns in the face of unlawful employer action and one who resigns during a strike. There may be an equitable difference between the situations that could cause the Board to make different policy choices in each situation, but that is not Respondent's contention. Respondent's contention is that the Board flouts employee health and welfare law and regulations, and plan documents by ordering reinstatement of a retired or resigned employee. In that regard there is no distinction between the Board's exercise of power to reinstate a discriminatee who is the victim of an employer's unlawful refusal to reinstate the employee who resigns to obtain 401(k) money, and the exercise of its power to reinstate a discriminatee who received a 401(k) distribution after being unlawfully discharged.

[45] 26 C.F.R. § 1.401(k)-(d)(2).

[46] Similarly, the IRS's determination that employees are independent contractors, or that employees are paid and file federal income taxes as independent contractors is not determinative of their status as "employees" under the Act. *Roadway Package Systems*, 326 NLRB 842, 854 fn. 46 (1998); *Southern Cab Corp.*, 159 NLRB 248 fn. 4 (1966). I note that under KSM's view, the Board's finding that the drivers in *Roadway Package Systems* or *Southern Cab Corp.* were employees could subject the drivers to prosecution by the IRS for filing false tax returns asserting they were independent contractors.

In this regard, the employer's uncertainty with regard to resignations is consistent with the fact that an employer should not presume from an employee's acceptance of interim employment that the employee has abandoned his employment. More generally, an employer will not know until it offers recall whether an individual striker intends to return. The burden on the employer is not great. It simply needs to offer reinstatement to former strikers—notwithstanding what it may guess, have heard, contemplate, or hope about a striker's intentions with regard to returning to employment. When it fails to do so, and takes the position that the employee has abandoned employment, it needs unequivocal evidence to prove it, and a resignation is not enough under well settled law. The point, of course, is that the Board has determined that the employer, and not the striker, must bear the risk when the employer chooses not to heed the Board's warnings to presume, until it can prove otherwise, that a striker will choose to return to employment at the completion of the strike.

Equitable considerations do not weigh in favor of Respondent. Indeed, the inequity in Board law in this area is more likely to weigh on employees rather than employers. As I discussed, above, there may be resignees on whose behalf the General Counsel did not seek backpay or reinstatement, but who were resigning because they needed their 401(k) funds. These may be employee who, believing (as Respondent contends the law should be) that having resigned to obtain the money they had no choice but to abandon employment at KSM, acted unequivocally in accordance with that belief and did, therefore, regardless of their true unstated desire to return to work at KSM, by all appearances abandon their jobs at KSM. This is the other side of the coin of Respondent's "equity" argument, and I have no doubt that in some instances resigning strikers suffer on account of their ignorance of Board legal doctrines. Nevertheless, employees in that situation will often be denied backpay and reinstatement.

KSM cites a 1968 case, *Mississippi Steel Corp.*, 169 NLRB 647, 663, enfd. in part 405 F.2d 1373 (D.C. Cir. 1968) for the proposition that "[f]rom Respondent's standpoint, it did have a right to rely on the resignations in order to fill the vacancies created." In that case the Administrative Law Judge, in a finding adopted by the Board, determined "[a]s a balance of the equities," that the resigning strikers must be reinstated but that backpay was tolled as of the resignation. In *Alaska Pulp*, supra at 525 fn. 17, the Board avoided addressing the continued viability of this dormant doctrine, noting that it "sometimes tolls a respondent's backpay liability if it finds that the respondent relied in good faith on a striker's resignation," but found such tolling inappropriate because "Respondent's unfair labor practices may have contributed to the strikers' willingness to resign." As discussed above, in view of the Board's subsequent development of the law, I do not believe that reliance on *Mississippi Steel*, or the strikers' resignations, justifies tolling backpay. An employer presumes abandonment at its peril. But even if this tolling doctrine lives at all, it should not apply here. As to four of ten resigning strikers, it is inappropriate for the same reasons relied upon by the Board in *Alaska Pulp*: "Respondent's unfair labor practices may have contributed to the strikers' willingness to resign." As to the remaining resigning employees, the record leaves no doubt that KSM played an active role in encouraging and facilitating striker resignations. The resignations were not visited upon an indifferent, unsuspecting employer, which then had to adapt to the loss of these employees. KSM was complicit in securing resignations without any concern or interest in whether the employees actually intended to abandon employment. Having encouraged, facilitated, and suggested the resignations, Respondent is not in a position to claim that equity demands that it can rely on the resignations to toll backpay at great cost to the discriminatees.[47]

2. Rodriguez's response to KSM's questionnaire as evidence of abandonment of employment

On October 16, 1997, after the Union's October 5 offer to return, KSM sent a letter to each striker that it considered still employed, stating that "it is necessary to communicate with you concerning your personal intention to be considered for recall to KSM Industries as positions for which you are qualified become available." The letter asked employees to complete the following:

> Do you wish to be considered for future recall to KSM Industries as positions for which you are qualified become available? (Place an "X" indicating your choice)
>
> Yes ___No ___

The letter provided a place for the striker to sign and date his response, under a legend that read "I understand that a "NO" choice voluntarily terminates my employment with KSM Industries."

Jesus Rodriguez was a general factory striker who received the KSM inquiry described above. Rodriguez signed and returned the form, marking "No," in response to the question asking whether he wished to be considered for future recall to KSM. Respondent points out that at the time Rodriguez signed the form he was working at another employer, Milsco, which was closer to his home than KSM, and covered by a collective-bargaining agreement.[48] Rodriguez did not endorse KSM coun-

[47] I note that in mounting its argument, Respondent continues to refer to the resignations as a "ruse" and "not authentic." The suggestion, a spillover from the argument, rejected above, regarding employees' efforts to resign to obtain their 401(k) funds, suggests that KSM was tricked or treated unfairly by the strikers who resigned, and by the General Counsel who seeks backpay and reinstatement on their behalf. KSM's view is unwarranted. Respondent need only have cursorily reviewed longstanding Board law to know that it should not have assumed that resignees abandoned employment. In this regard, KSM's assertion that the backpay obligation represented by resignees is 44 percent of the total it is alleged to owe and amounts to $188,438.59 is disingenuous. As KSM has pointed out (R. Brief at 2), "Respondent's case is not a zero-sum game," and backpay denied a resignee will often be owed to another discriminatee who should have been recalled in his place. Indeed, according to Respondent's counsel, "[i]n a number of instances, as a result of mitigation efforts, Respondent would actually be better off by allowing a '401(k) quit' individual who fully mitigated, to stay in the case and to occupy a spot that should be held by another individual whose mitigation efforts were less successful."

[48] Respondent contends on brief that Rodriguez' new job was a "better job" and that "Mr. Rodriguez was more satisfied with his position at Milsco than he had been with his position at KSM." (R. Br. at 42). This was not established at the hearing.

sel's suggestion that he answered "no" on the questionnaire because the Milsco job was "a better situation" for him. However, Rodriguez agreed that "[a]t least back in October 1997 [he] preferred to stay at Milsco and work."

Respondent contends that Rodriguez's negative response to KSM's inquiry terminated his employment. This is incorrect under Board precedent. Respondent's inquiry clearly was not an offer of employment,[49] and Respondent does not so contend. "[Until the discriminatee has received an unconditional offer from his employer he is incapable of refusing reemployment." *Montgomery County MH/MR Emergency Services*, 239 NLRB at 827; *REA Trucking Co., Inc.*, 176 NLRB 520, 526 (1969), enfd. 439 F.2d 1065, 1066 (9th Cir. 1971). *Alaska Pulp Corp.*, 326 NLRB at 541 ("Respondent argues that [unreinstated striker] Bartels had been unwilling to participate in an apprenticeship program to acquire multi-craft skills, thereby rendering himself ineligible for the only maintenance position in which he could have been employed. Yet, regardless of what Bartels may have said at that time, it was not said in response to an offer of reinstatement"). A negative response to an invalid offer is of no consequence. *CleanSoils, Inc.*, 317 NLRB 99, 110 (1995). Respondent's contention is that it is clear from Rodriguez' statement at trial, combined with the response to KSM's recall inquiry, that, in October 1997, Rodriguez had abandoned employment. However, the Board has rejected this contention. In *L'Ermitage Hotel*, 293 NLRB at 927, a discriminatee who failed to respond to a letter inquiring about his interest in reinstatement testified that he did not do so because,

> when he received the letter he was working for another employer and believed he was making more money than he could have made in Respondent's employ. Therefore he did not respond to the letter. This admission, according to Respondent, tolls its backpay liability even if the letter was deficient. Respondent's contention must be rejected in light of the Board's recent decision in *Consolidated Freightways*, 290 NLRB [771] 1988 wherein the Board held that "an employer must first extend a facially valid offer of reinstatement before we examine a discriminatee's reasons for declining the offer."

Given KSM's failure to offer reinstatement to Rodriguez in October 1997, "it is unnecessary to speculate on what [Rodriguez's] response would have been had Respondent unconditionally offered to reinstate him" in October 1997. *Montgomery County*, supra. Rodriguez did not abandon employment or his right to reinstatement when he answered KSM's questionnaire.[50]

[49] See, e.g., *L'Ermitage Hotel*, 293 NLRB 924 (1989), enfd. 917 F.2d 62 (D.C. Cir. 1990); *Montgomery County MH/MR Emergency Services*, 239 NLRB 821 (1978), enfd. without op. 612 F.2d 573 (3d Cir. 1979).

[50] Respondent ultimately reinstated Rodriguez but, apparently, treated him as a new hire. I note that Respondent does not separately challenge the General Counsel's contention that Rodriguez, who was working at KSM at the time of the hearing, never had his vacation benefits and seniority reinstated. Given that I have found that Rodriguez did not sever his employment with KSM, an order to restore his seniority and vacation benefits will be part of the remedy.

B. The reinstatement process

In *NLRB v. Fleetwood Trailer*, 389 U.S. 375 (1967), the Supreme Court explained that,

> If, after conclusion of the strike, the employer refuses to reinstate striking employees, the effect is to discourage employees from exercising their rights to organize and to strike guaranteed by §§ 7 and 13 of the Act. Under §§ 8 (a)(1) and (3) it is an unfair labor practice to interfere with the exercise of these rights . . . . without reference to intent.

389 U.S. at 378, 380 (citations omitted).

Once the striker makes an unconditional offer to return to work, "the Respondent [is] under a duty to timely reinstate him to his prestrike position or, if that position no longer exist[s], to a substantially equivalent position." *T.E. Briggs Construction Co., Inc.*, 349 NLRB 671, 672 (2007).

Notwithstanding this, an employer can mitigate its liability or rebut the finding of an unfair labor practice entirely by demonstrating that its refusal to reinstate strikers was due to "legitimate and substantial business justifications." *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967). "The burden of proving justification is on the employer." *Fleetwood*, supra.

If the General Counsel has not proven that the strikers are unfair labor practice strikers, one substantial and legitimate business justification that an employer can rely upon for failing to reinstate strikers is proof by the employer that the strikers have been permanently replaced. Id. at 379 & fn.5; *Chicago Tribune Co.*, 304 NLRB 259, 261 (1991) ("Contrary to the Respondent, we find that it must prove the contested fact of permanent replacement as part of its affirmative burden of proving substantial and legitimate justification for failing to hire former economic strikers upon receipt of their unconditional offer to return to work"). This justification is unavailing in the case of unfair labor practice strikers, because the employer's duty to reinstate includes the obligation to displace replacements hired to fill the unfair labor practice strikers' positions. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956). Where, as here, an economic strike converts to an unfair labor practice strike, permanent replacement justifies the refusal to reinstate a striker only to the extent the striker was permanently replaced prior to the conversion of the strike. *KSM Industries, Inc.*, 336 NLRB at 134 fn. 4. Notably, "[t]he reinstatement rights of an unfair labor practice striker and an economic striker are the same if the employee has not been permanently replaced." *T.E. Briggs Construction Co., Inc.*, supra at 672.

Another "legitimate and substantial justification for not immediately reinstating former strikers is a bona fide absence of available work for the strikers in their prestrike or substantially equivalent positions." *Zimmerman Plumbing and Heating Co., Inc.*, 334 NLRB 586, 588 (2001). This requires a showing by the employer that there is not work available because of reductions in business or the elimination of a striker's job based on "substantial and bona fide reasons other than considerations relating to labor relations." *Fleetwood Trailer*, supra at 378 fn. 4, 379–380 (proof by General Counsel that jobs of strikers are still available "is not essential to establish an unfair labor practice. It relates to justification, and the burden of proof is on the employer"); *Refuse Compactor Services,* 311 NLRB 12 fn. 4

(1993), enfd. without op. 57 F.3d 1077 (9th Cir. 1995); *Radio Electric Service Co.*, 278 NLRB 531, 532 (1986), enfd. without op. 826 F.2d 1056 (3d Cir. 1987); *Burns Motor Freight*, 250 NLRB 276, 279 (1980).

1. The General Counsel's formula

The General Counsel's formula for calculating recall and backpay eligibility is based, first, on the immediate slotting, as of October 5, 1997, of strikers into positions held by "unprotected" replacements. Under the General Counsel's formula, the strikers entitled to reinstatement to these positions were the most senior strikers within each job classification in which unprotected replacement workers remained. Notably, based on a review of R. Exh. 39 (a chart created by Respondent to show its view of the individuals entitled to backpay and reinstatement) KSM does not dispute—indeed, it admits—that at strike's end the senior strikers within each classification should have been reinstated to positions occupied by the unprotected replacements.

Under the General Counsel's compliance formula, after assigning strikers to fill unprotected replacements' positions, each time a working employee, whether a protected replacement worker or recalled striker, terminated their employment, or when a striker offered recall declined the offer, an additional striker—the senior unrecalled striker in the relevant classification—should have been recalled and backpay began accruing for that striker.

Putting aside, for the now, the issue of the General Counsel's reliance on seniority to determine who should have been entitled to vacancies (a matter I take up below), the General Counsel's presumptions that the departure of a protected replacement or recalled striker, and the unaccepted offer of employment by a recalled striker, showed an open position for a new unrecalled striker, is a reasonable formula. The proposition that an employee left work to be performed when he quit, and that the employer offered recall to an employee because there was work for that employee, are logical and presumptively true. The formula, in this regard, satisfies the General Counsel's burden, and the burden shifts to Respondent to establish facts that would negate or mitigate its liability. Thus, it is Respondent's burden to demonstrate that work was not available in the classification where an employee has just resigned or where Respondent has offered a position to an employee who declined recall. This could be because of an abrupt halt in work, or because the departing employee was laid off for lack of work, or any number of other circumstances. But it is Respondent's burden to show. No argument to counter the General Counsel's position is offered on brief and no evidence was proffered at trial to counter this logical presumption. I reject the contention that where no one was immediately hired to replace a departing employee, the Respondent has proven that there was no position for an unrecalled striker. This ignores the ability of an employer to avoid recalling strikers to perform available work, at least for a period of time, by not undertaking available work, stretching its existing workforce, and shifting unit work to supervisors (a matter discussed below). Respondent's duty was to reinstate the unfair labor practice strikers to their former position or to one substantially equivalent, and not, as Oechsner put it, to "just ke[ep] muddling through it" without unreinstated strikers. I accept the General Counsel's formula in this regard.

A related challenge to the General Counsel's reinstatement formula is Respondent's department-specific challenges to the General Counsel's reinstatement allegations. The General Counsel's compliance specification seeks backpay for a number of employees in specific departments in which Respondent asserts it did not have available work at the conclusion of the strike. Specifically, to the extent that Respondent's diminished need to recall strikers is based on supervisors performing bargaining unit work, or the assumption of strikers' job duties by other bargaining unit employees (replacements or recalled strikers), the General Counsel rejects Respondent's position that work was unavailable for the unrecalled strikers. As discussed below the General Counsel disputes that Respondent has demonstrated a substantial and legitimate justification for failing to reinstate strikers where the failure is attributable to any of these reasons. [51]

2. Departmental and individual reinstatement issues

a. Shearing

Shearing involves the cutting and refabrication of the metal used in KSM's production. The introduction in the spring of 1996 of a computerized laser system, called the Mazak, to cut and fabricate the metal dramatically reduced the amount of shearing work required. Shortly after the introduction of the Mazak, a "tower" that attached to the Mazak and automatically loaded the steel from the laser was introduced. Prior to the introduction of the laser, KSM employed 6-7 shear operators on a total of two shifts. At the commencement of the strike in 1997, there were 4 shear operators, with one, Roger Stern, spending approximately 30–40 percent of his time operating the Mazak laser. A second Mazak laser was installed in 1999, and a third in 2006. Currently, one individual, Stern, performs shearing work on a regular basis.

After the strike, Respondent did not regularly employ any strike replacements in the shear position. There was, however, shearing work performed. Instead of recalling a shearing operator employee, Respondent recalled a general factory employee and striker, Laverne Jung, on December 1, 1997, and assigned him to operate the shear. Before the strike, Jung had occasionally operated the shear (the ability to do shearing work is covered by the general factory job description) but his testi-

[51] At trial, some evidence, and much argument, were offered to show that an increase in contracting out limited the availability of jobs. However, on brief, the General Counsel does not pursue that argument with regard to KSM's failure to recall employees. The Union raises it generally, but without tying it to any unrecalled striker. Employee Bojar offered some testimony about the subcontracting of items after the strike that were not subcontracted before the strike, but his anecdotal account does not show much, if anything, about KSM's overall subcontracting practices. While it is KSM's burden to prove that work was unavailable for unrecalled strikers, it is not its burden to prove that it did not increase contracting out, at least until evidence is presented that it did. I find the evidence does not establish that subcontracting increased during the strike to an extent that it affected the recall of strikers. For that reason, I do not reach the issue of whether KSM's reinstatement obligations conflict with such an increase.

mony demonstrates that this was seldom part of his work. After the strike, he performed primarily shear work until his retirement June 11,1999.

Stern was recalled to the shear department in February 1999. He soon realized that the bargaining unit work he had performed on the Mazak laser before the strike had been taken over by supervisors. Before the strike, supervisors had been responsible for programming the laser to make the desired cuts on the metal, and had directed bargaining unit employees with regard to the materials and sizes needed to be loaded into the tower. They occasionally did other work, such as unloading steel from the Mazak, if bargaining unit employees were on break or otherwise unavailable, and they helped to clean and focus the specialized lenses on the laser. However, the bargaining unit employees would then download the program, load the tower, change the tanks, clean under the machine, place order papers on the finished material, and "just generally ran . . . the machine." This work comprised a significant amount of Stern's work prior to the strike. After the strike, Stern "wasn't to do anything with the laser." He asked his supervisor, Bob McKinney about this, and McKinney told him "management basically is running the laser now."[52]

In sum, traditional shearing work, which had begun declining before the strike, continued to decline after that strike, even after orders picked up. However, laser work, which before the strike had been part of the shearer operator's work, increased after the strike to the extent that additional lasers were added. The consequence of turning this work over to supervisors was that work opportunities were limited for unrecalled shear operators.

The General Counsel's position, as set forth on brief, and consistent with the calculations in the compliance specification, is that shear operator employees should have been recalled to perform the shear department's work. This includes the laser operations work that, prior to the strike consumed up to 40 percent of bargaining unit employee Stern's time, as well as shearing work that general factory Jung was utilized to perform. Respondent disputes any obligation to preserve the prestrike bargaining unit work for shear department employees.

In assessing available work for returning strikers, the Board considers nonbargaining unit employees and supervisors in particular, to be "in effect, striker replacements." *Radio Electric Service Co.*, 278 NLRB at 532 ("it is clear that the work previously performed by the strikers has not been abolished because, by the Respondent's own admission, that work has been reassigned to, and is presently being performed by, nonbargaining unit employees") *Super Glass Corp.*, 314 NLRB 596 fn. 1 (1994) ("In adopting the judge's finding that the Respondent unlawfully refused to reinstate five striking employees, we reject, as did the judge, the Respondent's contention that it had no work for these five strikers. The evidence indicates that the Respondent utilized several individuals, some of who were already on the Respondent's payroll, to perform unit work during the strike as well as after the Respondent received the Union's unconditional offer to return to work. . . . Regardless of whether these individuals were previously working for the Respondent in management or other nonunit positions, or were newly hired, they were clearly replacements performing unit work at a time when the Respondent was obligated to offer that unit work to the unfair labor practice strikers seeking reinstatement"). Respondent may not use nonunit employees to absorb unit work to the prejudice of unrecalled unfair labor practice strikers.[53]

The issue is somewhat different with regard to Respondent's decision to recall general factory employee Jung on December 1, 1997, nearly 2 months after the strike ended, and assign him to perform shearing work. There is no issue here of available work being absorbed by nonunit employees or unprotected replacements. The objection is to Jung's *recall* to shearing duties on an essentially full-time basis, at a time when the shearing position was vacant and shearing operators were awaiting recall. Respondent contends it was free to make such an assignment, prestrike under the terms of the labor agreement, and poststrike in accordance with the terms and conditions of the expired agreement. That may be, certainly there is no evidence, either at trial, or at the time, that the Union believed that this was wrong. If Respondent were wrong an unfair labor practice allegation could have been pursued and it would have been meritorious.[54]

Be that as it may, Respondent's contention that it was acting within its contractual—or more precisely, as the contract had expired, acting without committing an unlawful unilateral change—misses the point. Respondent's obligation under the longstanding case law, and specifically under the Board's order in this case, was to offer reinstatement to these unfair labor practice strikers "to their former positions or, if those positions no longer exist, to substantially equivalent positions." *KSM*, supra at 136. The phrasing of the order is not superfluous, and not arbitrary. It reflects the Board's longstanding view that it is

[52] I credit this undisputed testimony, including the admission by McKinney, as well as the corroboration by other employee witnesses of the fact that after the strike supervisors took over operation of the Mazak from bargaining unit employees. Respondent contention on brief to the contrary is untenable. That management played a limited role in the laser operation prior to the strike is not inconsistent with the fact that the bargaining unit's well established role in operating the laser was eliminated after the strike. Notably, the prior terms and conditions of employment, as set forth in the expired labor agreement that Respondent generally comports to be complying with, significantly limits the instances in which nonbargaining unit employees can perform bargaining unit work. See, Article 1, Section 7 of 1994 labor agreement.

[53] This finding is without regard to the fact that a unilateral change in the use of supervisors to perform bargaining unit work is a violation of Section 8(a)(5), and of Section 8(a)(3) if discriminatorily motivated. This case contains no such independent allegations, but that is irrelevant. The issue in this case is the unlawful failure to reinstate strikers and, as set forth in the text, an employer may not limit strikers' recall by assigning unit work to nonunit employees.

[54] There can be no doubt that the job reassignments, eliminations, subcontracting and other changes in terms and conditions are mandatory subjects of bargaining, as is the loss of work opportunities resulting from such changes. Hence, unilateral action in these spheres constitutes a per se breach of the Act. *Holmes & Narver*, 309 NLRB 146, 146–148 (1992); *Wilen Mfg.*, 321 NLRB 1094, 1097 (1996); *Ironton Publications*, 321 NLRB 1048, 1067, 1069 (1996) (imposing additional duties on employees is mandatory subject of bargaining).

"[o]ur duty is to ensure that strikers who have unconditionally offered to return to work are to be treated the same as they would have been had they not withheld their service." *Rose Printing Co.*, 304 NLRB at 1078. For this reason "the touchstone for determining reinstatement rights is ascertaining whether the job is the same as, or substantially equivalent to, the prestrike job." Id. at 1077; *Towne Ford,* 327 NLRB 193, 195 (1998) (issue is "[h]ad the employees not gone on strike, they would have been filling those positions"), enfd. 238 F.3d 429 (9th Cir. 2000). If it is, the striker should have it. By the same token an employer is not required to reinstate a striker to *any* vacant position, even one for which the striker is qualified. *Rose Printing*, supra. But rather, only to the striker's prestrike or substantially equivalent position. *T.E. Briggs*, supra at 672 fn. 6 ("[t]o clarify, strikers are not entitled to reinstatement to nonequivalent positions"). At the time Jung was recalled, Stern's shearing position was available, filled only by supervisors performing Mazak work which, as discussed above, was illegitimate. Respondent was obligated to reinstate Stern to perform Stern's prestrike position. It could not ignore Stern and recall a general factory employee to perform Stern's prestrike position.[55]

The upshot is that Stern should have been recalled to fill the vacant shear operator position at the end of the strike. This work was available prior to Jung's December 1, 1997 recall and assignment to perform it. No evidence suggests that the shearing work, including the Mazak work, only became available after Jung had been reinstated.

General Counsel also contends that with the recall of Stern on February 15, 1999, with Stern working alongside Jung, the evidence shows that there was enough work in the shear department for two shear operators, and those two should have been Stern and Rettler, the next most senior shear operator. In other words, the General Counsel contends that Jung, who should not have been working in the shear department in Stern's place in the first place, should not, as well, been working in place of Rettler either. I do not agree.

As discussed, above, there is no allegation that Respondent independently violated the Act by using Jung to perform shearing. Stern was entitled to backpay for the shearing work Jung (and supervisors) were performing because the work was available for Stern even before Jung was recalled and assigned to perform shearing work. But when Stern actually assumed his shearing position, that does not mean that Rettler was entitled to Jung's work as well. To the contrary, at least where there is no independent violation of the Act—i.e., an unlawful discriminatory motive or an unlawful unilateral change—Board law permits the use of previously reinstated strikers or lawfully retained replacements to be assigned the work of unrecalled strikers. *Randall, Burkett/Randall, Division of Textron, Inc.,* 257 NLRB 1 (1981). The transfer or reassignment of such work does not trigger a vacancy for an unrecalled striker.

However, when Jung left in June 1999, the evidence would suggest that an additional shear position was available, which should have been filled by Rettler. Respondent points out that no one replaced Jung performing full-time shearing, but his shear work had to be done. More important, even if Jung's shear work was diminishing, in 1999 a second laser was added at KSM. This would involve a significant increase in laser work performed by supervisors but owed to an unrecalled striker. Prestrike, Stern spent 30 to 40 percent of his time operating one laser. Two operating lasers, combined with the remainder of Jung's work, would easily provide work for another full-time employee. Although there is uncertainty about the date in 1999 when the second laser began operation, these doubts are properly resolved against Respondent. I find that upon Jung's departure, there was work for a second shearer operator and an additional shear operator should have been recalled. Obviously this determination is an example of the "problematic and inexact" nature of determining backpay awards, but it is the most accurate calculation possible under the circumstances.[56]

b. Inspection department

Prior to the strike two bargaining unit employees worked as inspectors.[57] Along with a quality control supervisor, they performed general inspection work throughout the facility. In addition to the inspectors, it had long been the practice for production employees to contribute to quality control by checking their own work for errors or deviations.[58] Production supervisors performed minor inspection duties in their departments as well.

After the strike, KSM did not recall the inspectors. Inspection duties were performed, as before, by bargaining unit employees checking their own work, supervisors assisting in their departments, and by the quality control manager. The significant change after the strike was the increase in inspection performed by supervisors, who now performed inspection daily, as well as the inspection work now performed extensively by other nonbargaining unit employees were also assigned inspec-

[55] Notwithstanding some overlap in the job descriptions, there is no contention that the shear operator's job is substantially equivalent to the general factory position.

[56] Accordingly, I set Rettler's backpay period as June 14, 1999 to February 3, 2004. This eliminates Rettler's first quarter 1999 backpay and reduces the second quarter net backpay to 2.2 weeks. Assuming that the gross and interim backpay set forth in the General Counsel's calculations were earned evenly through the second quarter, this leaves net backpay for the 2.2 weeks at $64.68. Rettler's total net backpay is reduced to $1869.98.

[57] The two were Harvey Kahn who resigned during the strike and for whom no backpay is sought, and Randall Henning, who the General Counsel alleges was entitled to reinstatement and backpay from the end of the strike though May 19, 1998, when he declined recall.

[58] This can be distinguished from the more general and formal duties performed by inspectors. As Jung explained, in response to a question about whether he performed his own inspection work, "I made that part of my job, yes. *There was inspectors there.* . . . I always looked over my work when I got done to make sure for myself that I had done it right." (emphasis added). KSM points out that its "quality inspection/responsibility procedure" duties, set forth in R. Exh. 1, establish that inspection was always the duty of each production employee. However, this document shows that the employees' inspection responsibilities were in addition to, not in lieu of the work performed by the inspectors. Indeed, the stated purpose of emphasizing quality control and inspection duties for production employees was to "free" inspectors for more pressing and complex inspection duties. R. Exh. 1 at 1–2.

tion work after the strike. As employee Paul Bojar explained, "[w]hoever was not doing anything in the office I think they came down and helped inspect."[59]

In this case, Respondent has failed to show that there was not work available for one inspector at the end of the strike. Instead the work was shifted to supervisory and nonbargaining unit personnel. As discussed above with regard to the laser work, Respondent cannot shift bargaining unit work to nonunit employees and claim that work is unavailable for a qualified unrecalled unfair labor practice striker. *Radio Electric Service Co.*, supra at 532; *Super Glass Corp.*, supra at 596 fn. 1.[60]

c. The Stockroom

Prior to the strike one bargaining unit employee, Doug Wiedeman, was employed in the Stockroom and Receiving 2 position. His supervisor was Dave Hunkel. His work involved accepting incoming parcels, unloading trucks, storing, disbursing, and inventorying, and monitoring stock levels of materials.

Wiedeman was not recalled until February 3, 2004. A number of witnesses testified, and I find, that until Wiedeman was recalled his stockroom work was performed by supervisors Kingsbury, Hunkel, and recalled striker Norbert Jahn. Hunkel also confirmed this to Wiedeman. Kingsbury, the welding supervisor, ordered and took stock for the welders. He would write up orders to give to Hunkel. Hunkel would stock incoming parts, determine what needed to be ordered and enter the information in the computer. Jahn would unload trucks and move materials to the inventory. Jahn was recalled to work October 20, 1997 to his general factory 2 position. After the strike, in addition to his general factory 2 work, he performed significantly more stockroom duties than in the past. However, certain stockroom and receiving duties were part of the general factory job description, a job designed to be flexible and to encompass a broad range of work. Jahn testified that before the strike he also performed some stockroom and receiving work.

On November 8, 1999, Union President Malson complained to KSM that while Jahn was classified and paid as a general factory 2 employee, since returning from the strike KSM had added stockroom and receiving work to his duties and he should be receiving the highest paying stockroom rate applicable to the stockroom and receiving 1 position.[61] The next day KSM, by Oechsner, responded to Malson's grievance, denying the request. Oechsner denied that Jahn performed many duties covered by the stock and receiving 1 position. He admitted that Jahn performed some duties consistent with Stock and Receiving 2, but concluded that "for the majority of a workweek Mr. Jahn works within the General Factory 3 classification while occasionally performing duties that cross into the General Factory 2 and Stock and receiving 2 classifications."

The upshot of this is that Jahn, who had performed some stockroom work prior to the strike, performed more after the strike. Yet KSM denies that the majority of his workweek was spent performing stockroom work. I accept Respondent's claim, which, in this context is an admission of a party opponent. I find that after the strike, the majority of Wiedeman's work was performed by supervisors Kingsbury and Hunkel. Wiedeman's work was available, but was being performed by supervisors. As discussed above with regard to the laser and inspection work, Respondent cannot shift bargaining unit work to nonunit employees and claim that work is unavailable for a qualified unrecalled striker. *Radio Electric Service Co.*, supra at 532; *Super Glass Corp.*, supra at 596 fn. 1. The work that Jahn performed in the stockroom, must be analyzed similar to the situation with Stern and the shearing department, set forth above. At strike's end, the stocking and receiving position was vacant, manned, illegitimately by supervisory personnel. Instead of recalling the stocking and receiving employee to his former position to displace the supervisor's and pick up the additional work assumed 2 weeks later by Jahn, Respondent ignored Wiedeman and recalled a general factory employee, added some stockroom duties to his prestrike work, and, along with supervisors, filled the stockroom position to which Wiedeman was entitled. As with Jung and the shearing work, after the strike was over, Respondent might have been able to transfer stockroom duties to an incumbent general factory em-

[59] I credit Bojar and Malson's observations about the increase in supervisory and nonbargaining unit employee inspection work after the strike. Bojar is a 34-year employee of KSM and through his work, which required him to move throughout the plant, he gained much knowledge of facility practices. I realized he erred in testifying that the Mazak began production with the loading tower in 1996 (it actually came a few months later that year) but that is an exceedingly minor misrecollection. With this exception, and based on his demeanor and the plausibility of his testimony, I credit this witness. In addition, Bojar's testimony regarding increased supervisory inspection work after the strike was corroborated by the testimony of Malson, who also testified credibly. I note that Malson's testimony was free of overstatement, exaggeration or other indicia of tendentiousness. His testimony is credited. I do not accept KSM's suggestion on brief that supervisory involvement in inspection work did not increase after the strike. It did, and it is hard to see how it could not have. Oechsner estimated orders were halved by the strike, but that would account for the reduction of only one inspector. And that work picked up in the ensuing months. There is no evidence that bargaining unit employees increased inspection duties after the strike. They continued to monitor their own work as always. The difference after the strike was the increased inspection role for supervisors. I also note, in response to KSM's contention that the Mazak reduced the need for inspectors, that the Mazak was introduced prior to the strike, and the two inspectors worked until the strike began. The second laser was not introduced until 1999, well after the close of the backpay period for the unrecalled inspection employee Henning.

[60] Respondent argues that if Henning is entitled to backpay it should end as of February 20, 1998 when Henning was offered recall to the weld setup A classification. Respondent maintains that the weld setup A position is "substantially equivalent" to Henning's inspection position. I need not decide if the weld setup A position is substantially equivalent to Henning's inspector's job. As I have found, work was available for Henning in his prestrike position when he was offered and declined the weld set up position. "The employer is required to offer the individual the 'same position,' unless it shows that such position is not available . . ." *Comar, Inc.*, 349 NLRB 342, 361 (2007); *Murbro Parking*, 276 NLRB 52, 56 (1985) ("An employer does not have the option of choosing a substantially equivalent job where the discriminatee's former job is still extant"). KSM's backpay and reinstatement obligations to Henning are unaffected by the offer of recall to the weld setup A position.

[61] Stock and Receiving 1 was a labor grade 7. Stock and Receiving 2, and General Factory 2 were in the lower paying labor grade 8.

ployee when inspector work arose instead of recalling an unrecalled inspector. But Respondent was not privileged to *recall* a general factory employee after the strike was over and have him and two supervisors perform the job that was the prestrike job of an unrecalled and unreplaced stock and receiving employee.

Respondent contends that stocking and receiving work declined after the strike and did not warrant the reinstatement of a stocking and receiving employee at strike's end. Respondent has failed to meet its burden of proving this. It asserts that the conversion of the stockroom from a "closed" to an "open" stockroom—which made certain items accessible to employees without the need of consulting with a stockroom attendant—diminished the need for a stocking and receiving employee. But that change occurred prior to the strike and there is no evidence suggesting that Wiedeman's position was imperiled by this change. Respondent also contends that work orders were reduced after the strike, but this assertion—which I do not doubt—is unsupported by any evidence that could be used to assess the impact of the loss of work for the stocking and receiving position. Since the record is clear that a significant amount of stocking and receiving continued after the strike—doled out between 2 supervisors and a general factory employee—the bald assertion, even if uncontradicted, is insufficient to meet Respondent's burden. *Burns Motor Freight*, 250 NLRB at 279 ("testimony that the Respondent lost business as a result of the strike, although uncontradicted, was not corroborated or documented. . . . There was no showing of any specific loss of revenues, nor was there even a showing of the effect of the claimed loss of business on the total employee complement as compared to that existing prior to the strike"). It is no small matter that neither Hunkel nor Kingsbury was called to testify. They would have been the natural witnesses to provide evidence that, contrary to the testimony of employee witnesses, they were doing a paltry amount of stocking and receiving work, and that their stocking and receiving work, combined with Jahn's, did not amount to a full-time job. There was no such testimony. Wiedeman, on the other hand, testified that in February 2004 when he was reassigned to his prestrike stocking and receiving position it was a fulltime job.[62]

d. General Factory classification

One aspect of the compliance specification that Respondent disputes is the treatment of replacement Pane Chanthaphavong—who was hired March 19, 1997, the date the strike converted. The General Counsel's compliance specification treats Chanthaphavong as an unprotected replacement in the General Factory position. I reject Respondent's assertion that Chanthaphavong should be accorded the status of a permanent (or as the parties put it a "protected") replacement. The Board's order in this case—terms of which are not in dispute or subject to amendment in this proceeding[63]—states unequivocally that strikers are to be reinstated to their former positions "dismissing if necessary any persons hired as replacements *on* or after March 19, 1997." (emphasis added). The order further states that remaining strikers are to be placed on a preferential hiring list and offered employment "on the departure of any replacement hired before March 19, 1997." Under the explicit terms of the Board order, Respondent was required to dismiss Pane Chanthaphavong, and all others "hired as replacements on

[62] Oechsner disputed this, but barely. Asked by Respondent's counsel: "As a matter of fact, since the strike has ended, has anyone worked full time in the stockroom?" Oechsner answered: "A hundred percent of their time, no." Following up on this, Respondent's counsel asked Oechsner, "And even today, is there currently enough work available in the stockroom to have an employee work full time in that area?" Oechsner answered: "Not to fully occupy their time, no. . . . They're occasionally pulled off and put on other operations." This does not sound like Wiedeman is lacking for work related to his position. I note that he was recently promoted to stock and receiving 1, a higher paid, higher skilled stock and receiving position, which suggests that there is a significant amount of work for him in this department.

At trial, Respondent produced a computer generated account of Wiedeman's time covering January 2006 to mid-October 2006. It showed that Wiedeman worked 56 percent of his time performing tasks that, for work order and billing purposes, were called stock and receiving. Respondent says that there is more stock and receiving work in 2006 than in earlier years after the strike, and therefore, this shows there was little stock and receiving work after the strike. I cannot give much weight to this document, at least as applied to this argument. First of all, it is inconsistent with the testimony, including Oechsner's. Nothing in his testimony, and I have set out some of it in this footnote, suggests that in 2006 Wiedeman was spending only half of his worktime performing stock and receiving work. I believe that if this were so, Respondent's witnesses would have trumpeted it. Second, the document lacks reliability. As Oechsner explained, "we have quite a bit of trouble at work with people clocking in on the wrong operation or clocking in and forgetting to clock out and the times are not always accurate." For that reason, "[e]ach day there's a person responsible for going through the labor postings from the previous day . . . and make an adjustment to correct the previous day's labor postings." The production records on Wiedeman were studded with these corrections, which are called "negative postings." As Oechsner recognized, "I agree, there's a lot of 'em. There's a lot of negative postings." Their accuracy is unverifiable, and the extensive need for them calls into question the reliability of the underlying document. Moreover, the dates on which there are negative postings leaves gaps in the record: the work Wiedeman actually did on these days is not reflected on the document. Oechsner cannot vouch for the accuracy of the negative posts. Further, some "direct jobs" were already purged when this document was generated and those purged jobs are not reflected on the sheet. (Respondent points out that the purged jobs would not be stocking and receiving and suggests that this means that Wiedeman's stocking and receiving work may have been even less than 56 percent in 2006). I also note that the underlying data supporting this summary document no longer exists, raising questions about the appropriateness of the document under Federal Rule of Evidence 1006. Finally, as the document covers a period well beyond the back period, its relevance is dependent on the testimony that there was more stock and receiving work in 2006 than in earlier years. I do not believe the document was forged, or purposely designed to mislead or anything else nefarious. I do believe that the program was designed to aid in customer billing and internal job costs, and not for documenting the nature of an employee's workday. In light of the irregularities discussed above, and in light of the testimony from Wiedeman, and from Oechsner, I do not believe this document can serve to satisfy KSM's burden of proving that there was not stock and receiving work for an employee after the strike.

[63] *Transport Service Co.*, 314 NLRB 458, 459 (1994).

or after March 19, 1997," in order to make way for returning strikers.[64]

Respondent raises two additional contentions regarding the general factory aspect of the compliance specification.

Respondent asserts that the General Counsel's compliance specification fails to account for two unprotected replacements (N. Love and T. Keungsavath) who were "laid off due to returning strikers" on October 10, 1997. I disagree. At strike's end there were six unprotected replacements working in the general factory classification, including Love and Keungsavath. The General Counsel seeks backpay for six unrecalled strikers at strike's end. After Love and Keungsavath's layoff, striker Jahn was recalled on October 20, 1997. At that point, the General Counsel reduces the accruing backpay demand to five strikers. When striker Jung was recalled on December 1, 1997, leaving four unprotected replacements working in the general factory classification, the General Counsel reduces the accruing backpay demand to four strikers. Thus, as N. Love and T. Keungsavath's positions were filled by Jahn and Jung the General Counsel accounted for this by reducing the number of strikers continuing to accrue backpay to equal the number of unprotected replacements who continued to work.

Respondent also asserts that it is paying "double backpay liability" because the General Counsel seeks backpay for unrecalled striker Stern in the shearing department, while that work was performed by a general factory employee. According to Respondent, it should not have to pay backpay to "two individuals—one in GF and one in Shear—for one replacement worker in GF." Respondent contends that this "goes beyond making discriminatees whole and should be denied." Respondent misconceives the compliance specification. General Counsel, appropriately, seeks backpay for one unrecalled general factory striker for each unprotected replacement position. As discussed above, in addition to the four unprotected general factory replacements working as of December 1, 1997, Respondent recalled striker Jung to work in the shear department, along with supervisors, thus unlawfully denying reinstatement to shear operator Stern. As discussed above, Stern is owed backpay. No general factory striker is receiving backpay on account of Jung's work. As discussed in the preceding paragraph, Jung's reinstatement reduced by one the number of unreinstated general factory employees receiving backpay. It is true, of course, that Respondent paid wages to Jung, and to two supervisors, for work that should have been performed by Stern and for which backpay is appropriately assessed on Stern's behalf. In this sense only is Respondent "double paying." But I do not think that Respondent intends to contend that backpay due a striker—or any discriminatee, for that matter—should be reduced by the amount of wages Respondent paid to those who unlawfully replaced him.

e. Shipping department and James Kollenbroich's reinstatement

James Kollenbroich worked for KSM since 1977. Prior to the strike he worked for 20 years on the first shift in the shipping department performing final assembly work. At the time of the strike Kollenbroich's job title was shipping A. Prior to the strike Anthony Bannenberg worked as a shipping B employee with Kollenbroich. Prior to the strike, Roger Gutjahr worked second shift as a shipping A employee.

Prior to the strike, two employees, James Kranz and Anthony Schmitt worked as shipping & trucking A employees (first shift). Based on the job descriptions for these positions, the main difference between shipping A and shipping & trucking A (in addition to the higher pay for the shipping and trucking position) was that a shipping & trucking A employee was to maintain a commercial drivers license (CDL) that would allow him to drive the large truck used by KSM for deliveries. In fact, Kranz was the primary truckdriver and usually drove the large truck. He also performed assembly work similar to that performed by Schmitt and Kollenbroich. Schmitt "very seldom" drove the large truck. He did so when neither Kranz nor Supervisor Tony Oechsner were at work. Both before and after his promotion, Kollenbroich and Schmitt had worked alongside each other, for the most part performing the same or very similar work.

Kranz was recalled to work October 20, 1997, and resumed his prior work, including being the primary driver of the large truck. Schmitt was offered recall on May 19, 1998, to his first-shift shipping and trucking A position. He declined the offer on May 20, 1998. No one was hired to fill the position that Schmitt turned down. By letter dated May 19, 1998, Kollenbroich was offered a shipper A position, but in a subsequent

[64] Respondent points out that, in its decision, the Board stated that "the Respondent violated Section 8(a)(3) by refusing to reinstate strikers who had not been permanently replaced as of March 19." (footnote omitted). I note that KSM has failed to prove that Chanthaphavong was hired as a permanent replacement. As discussed, supra, it is Respondent's burden to establish the facts justifying the refusal to reinstate a striker. Thus, it is well settled that "[i]t is the employer's burden to prove its affirmative defense that the alleged discriminatees were permanently replaced." *Towne Ford, Inc.*, 327 NLRB at 204; *Associated Grocers*, 253 NLRB 31 (1980) (permanent replacement "is an affirmative defense and Respondent has the burden of proof"), enfd. 672 F. 2d 897 (D.C. Cir. 1981). The "proof must be specific and must show a mutual understanding between the employer and the replacements that they are permanent." *Towne Ford*, supra; *Augusta Bakery*, 298 NLRB at 65. To prove a "mutual understanding" between the employer and the replacement the employer must produce evidence showing that *both* it and the replacements understood that their status was as permanent replacements. *Associated Grocers*, 253 NLRB at 32. Absent the employer's adducement of factual evidence proving mutual understanding of permanent replacement, the "Board has held that the presumption is that the replacements are temporary." *Hansen Bros. Enterprises*, 279 NLRB 741 (1986), enfd. without op. 812 F.2d 1443 (D.C. Cir. 1987). *Towne Ford*, supra ("Respondent offered little evidence to overcome the presumption that the replacements were temporary"); *Montauk Bus Co.*, 324 NLRB 1128, 1128 fn.1, 1138–1138 (1997) (presuming temporary status where employer's witnesses' testimony was conclusory and lacked weight, and was unsupported by replacement testimony). Respondent offered no evidence demonstrating the "mutual understanding" that Chanthaphavong was hired as a permanent replacement. It also should be noted that Respondent's chart showing strikers, replacements, and their status—a document created by Respondent and submitted to the Region in 2001 (GC Exh. 3), indicates that at that time Respondent considered Chanthaphavong an unprotected replacement.

phone call with Oechsner on May 20, the position offered to Kollenbroich was to a second-shift shipper A position. Kollenbroich agreed to take the second-shift position and reported for work on May 26. He reported for work on the first shift pursuant to KSM's request that he undergo a 1–2 week "indoctrination period" before being put on the second shift.

One week later, on June 2, 1998, with his commencement of second-shift work imminent, Kollenbroich told Oechsner that he did not want to work the second shift. Oechsner and Kollenbroich agreed that KSM would recall another employee on the recall list for the second shift and Kollenbroich would then return to the recall list and await an opening on the first shift. Oechsner prepared a letter summarizing what had transpired and asked Kollenbroich to review it and if it was accurate, to sign it. Kollenbroich and Oechsner both signed the letter, which is dated June 3, 1998, and which states:

> Dear Mr. Kollenbroich:
>
> This letter is to confirm our conversation and mutual agreement on June 2, 1998, regarding your employment status. On May 19, 1998, the Company extended a recall of employment offer by certified mail. The job offered to you during our phone conversation on May 20, 1998, was a second shift Shipper A position. You initially agreed to report to second shift following a one to two week first shift indoctrination period. You reported for work on Tuesday May 26th.
>
> However, on June 2, 1998, you stated your desire not to work second shift and requested the Company recall another laid-off worker to that position and to place your name back on the laid-off subject to recall list. It was mutually agreed that the Company will attempt to recall another Shipper A for the second shift position and that you will continue to work first shift pending replacement. The Company does[,] however, reserve the right to transfer you to second shift in the event it is unsuccessful in its attempt to recall another Shipper A.

Kollenbroich was then laid off and returned to the recall list. Records in evidence show that Roger Gutjahr was offered recall on June 3, 1998. Prior to the strike he had been a shipper A on the second shift. He accepted the recall and on June 15, 1998, began working on the first shift and moved to second shift June 22, 1998. There is no evidence suggesting that an additional employee was hired to work in shipping prior to February 25, 1999, when Kollenbroich was finally offered his first-shift shipping position. Kollenbroich declined that offer of recall on March 1, 1999.

The General Counsel contends that with Schmitt's decline of his recall, there was shipping work for Kollenbroich on the first shift, and Kollenbroich should have been recalled—not to Roger Gutjahr's second shift position, but to the first-shift shipping position that he held before the strike. The General Counsel's position stems from the fact, established by multiple witnesses, that qualifications and licensing aside, Schmitt performed very little truck driving and mostly performed shipping work identical to that performed by Kollenbroich. Kranz was recalled shortly after the strike ended and resumed truckdriving and his other prestrike duties. The General Counsel's contention is that the recall of Schmitt demonstrates that there was first-shift shipping/assembly work—of the very kind that Kollenbroich and Schmitt regularly performed.

KSM contends, initially, that Kollenbroich *was* recalled to his first shift, but then transferred, in accordance with the terms and conditions of the expired labor agreement, to the second shift. According to KSM, "the recall to first shift terminated any entitlement to backpay." (R. Br. at 109). This argument is inconsistent with the record facts. As clearly set forth in the letter (reproduced above) that Oechsner wrote to document events surrounding Kollenbroich's recall, Kollenbroich was not offered reinstatement to the first shift. He was offered the second shift position with the understanding that he would have a short "indoctrination period" on the first shift. It is well-settled that "an offer of employment for a different shift is not "substantially equivalent." *Associated Grocers,* 295 NLRB 806, 807 (1989). KSM cannot transform its offer of second-shift work preceded by a temporary "indoctrination period" on the first shift, into a bona fide offer of reinstatement to Kollenbroich's first shift position.[65]

The more significant issue is the question of whether there was, in fact, as General Counsel contends, work for Kollenbroich as a first shift shipping A employee. After Schmitt turned down the offer of recall to shipping and trucking A, KSM did not hire or recall another shipping and trucking A employee to the first shift. Nor did it hire or recall another shipping A employee to the first shift. After Kollenbroich rejected the second shift, Gutjahr was recalled and after a week on first shift, presumably an "indoctrination period" such as Kollenbroich had enjoyed, was put on second shift (where he had worked immediately prior to the strike). This raises the question: who, if anyone, performed the final assembly work that Schmitt would have done if he had been recalled and to which General Counsel maintains Kollenbroich was entitled? Oechsner testified that no additional employees were needed on the first shift. This was, however, at a time, late May and June 1998 when the "production requirements were building," or as Oechsner put it with regard to reinstatement of factory employees at this time, "[i]t was all hands on deck." Moreover, records show that strike replacement Durwin Nash, who worked as a first-shift shipping B employee, resigned in May 1999, presumably leaving additional shipping department work. The record shows, and Oechsner testified, that employees were routinely moved throughout the facility to accomplish work, including in the shipping area. Thus, the shipping work was performed on the first shift by a variety of employees from many different classifications, although it appears that none were classified as shipping department employees at that time. This included recalled strikers (such as Brandon Hottenstein), protected replacements

[65] I do not reach the issue of whether an employer may satisfy its duty to offer an unfair labor practice striker reinstatement to his former position by reinstating (without condition or limitation) the employee to his former position but then, upon his reinstatement, make an independent decision to transfer the employee to another shift or position. That issue is not presented in the case of Kollenbroich, who was reinstated with the understanding that he would have to go to the second shift.

(such as Charles Nash, who Oechsner recalled being "routinely" assigned to shipping) and unprotected replacement Pane Chanthaphavong who James indicated worked in shipping and who Oechsner recalled as working in shipping "a good portion" of 1998 and 1999 (and who Nash complained should have been moved out of shipping, instead of himself). Based on KSM's admittedly expanding production, its attempt to recall Schmitt to a first-shift position that would have primarily involved shipping assembly work, and the admitted use of unprotected replacement Chanthaphavong to perform shipping department work on the first shift, I find that the evidence supports the General Counsel's contention that there was work for at least one unrecalled shipping employee on the first shift as of May 1998. Kollenbroich's backpay period appropriately began to run on May 20, 1998, the date of Schmitt's rejection of a first shift offer that would have involved significant amounts of shipping assembly work of the type he and Kollenbroich had performed together for many years.[66]

f. The offer to reinstate Michael Servi

Michael Servi began at KSM in August 1976 and went on strike in January 1997. He worked as a Tape A programmer on the first shift prior to the strike. Four unprotected replacements were working in the tape department at strike's end and two remained working there through January 1999. The parties agree that Servi was unlawfully denied reinstatement at the end of the strike. However, the parties dispute whether Servi's backpay tolled and his right to reinstatement waived when he declined an offer of reinstatement in January 1999.

More than 14 months after the strike, KSM contacted Servi by letter dated December 22, 1998. The letter, from Oechsner, stated that "KSM anticipates an opening within the classification Tape A to occur in mid-January of 1999. This letter is to determine your availability for recall to that position." The letter went on to request that Servi contact Oechsner "to discuss your availability and possible recall." A few day later, on December 28, 1998, Servi called Oechsner to say, according to Oechsner's notes, that "he is available for recall in mid-January. I advised him the Company would contact him again should the opening occur." Oechsner wrote Servi again on January 26, 1999, stating,

> Following up on our conversation of last December, I am hereby offering you reinstatement to your former position of Tape A. If you are interested in returning to employment with KSM, contact me within three business days following receipt of this letter to discuss your date of return.

Servi called Oechsner on February 2, 1999. Servi said he would like to return to KSM but told Oechsner he would not be available until March 1, 1999. Oechsner testified that he

> reminded him of our conversation -- earlier conversation where he said he would be available in January and I asked him what prevented him from reporting sooner. He indicated to me that he had things to do and that the earliest he could report was 2/22 and we then agreed on that date.

Oechsner did not have an independent recollection of discussing health insurance with Servi during this conversation, but, based on the letter he received from Servi on February 18, he assumed that they did. Servi's letter (dated February 16, 1999) stated:

> Dear Dave,
>
> After our last conversation on February 2, 1999, it is apparent to me that some things have changed at KSM Industries that I believe were not part of the unconditional agreement to return to work. One of the most disturbing changes that you told me was a wait of over 60 days before I am eligible for any health insurance. The wait of over 60 days for these benefits greatly compromises my daughter, wife as well as myself.
>
> Therefore, with great disappointment I have to decline your offer of employment.

Servi's reference in this letter was to the fact, as Oechsner says he would have explained it to Servi, that health insurance for a returning striker would be effective on the first day of the month following 60 days. This was not the case for strikers who were previously recalled. Prior to January 1, 1998, strikers returning to work in October, November, and December 1997 became eligible for insurance immediately upon their return to work, as long as they had been covered by KSM insurance at the start of the strike, thus placing them in the same situation as when they went out on strike.

Oechsner agreed that, had Servi been recalled prior to December 31, 1997, he would have immediately been eligible for health insurance and would not have been subject to a waiting period for commencement of health insurance.[67]

[66] At the hearing, the extensive testimony solicited by the General Counsel questioning how quickly, and even whether Schmitt obtained a CDL seemed to suggest the argument that Kollenbroich could (and should) have taken Schmitt's position without a CDL. In its brief, Respondent anticipated and responded to this argument. That is not, however, the General Counsel's contention. I do agree with Respondent (and perhaps, with the General Counsel who forewent the argument) that such a contention would not be convincing. Even if only rarely used, KSM is entitled to require a CDL license for the shipping and trucking position, so that the incumbent in that position—which is a higher paid position than shipper A—can operate as a backup truck-driver. If KSM wants to pay extra to have the assurance of a backup driver, even if the employee generally performs only final assembly work like other shipping A employees, it is free to do so. KSM was under no obligation to train Kollenbroich or promote him to shipper and trucker A as part of the striker reinstatement process.

[67] As Oechsner explained in a January 21, 1998 letter to the Union, the immediate eligibility for insurance available in the first months after the strike was the result of an "informal waiver the Company requested and received from the health insurance underwriter. Since then, the Company was notified the underwriter will not extend this informal waiver beyond December 31, 1997, notwithstanding our efforts to have it extended." KSM was self-insured but paid an underwriter for stop-loss coverage, covering an employee's costs beyond a certain point. It could have chosen to cover any increased cost resulting from the immediate reinstatement of a striker's health insurance coverage. However, given its underwriter's position, after January 1, 1998, KSM took the view that returning strikers (other than those who had continuously

The General Counsel contends that the offer of reinstatement was invalid because of the attendant condition that Servi could not resume health care coverage for over 60 days and, therefore, by declining Servi did not toll backpay or waive reinstatement. It is, in fact, indisputable that had Respondent offered Servi reinstatement at strike's end, as it was lawfully required to do, Servi would not have been subject to a waiting period before resuming health insurance coverage. Therefore, the January 1999 offer of reinstatement was not an offer to a position with the same benefits that he would have received but for Respondent's discriminatory failure to recall him earlier.

This "clearly renders the offer invalid because 'a Board order for reinstatement of a discriminatee is designed to place that individual in the same position the individual would have been in had there not been discrimination against him.'" *Consolidated Freightways*, 290 NLRB 771, 772 (1988) (quoting *Craw & Sons*, 244 NLRB 241 (1979), enfd. without op. 622 F.2d 579 (3d Cir. 1980)), enfd. as modified 892 F.2d 1052 (D.C. Cir. 1989), cert. denied 489 U.S. 817 (1990). "Accordingly, an evaluation of the discriminatees' response to the letter [offer] is unnecessary." *Midwestern Personnel Services, Inc.*, 346 NLRB 624, 625 fn. 8 (2006).

In this case, it is notable, however, that consideration of the discriminatee's motive for rejecting the offer buttresses the General Counsel's position and, indeed, eliminates any suggestion that, in these circumstances, the delay in resumption of health care coverage was insignificant to the discriminatee. As Oechsner knew, Servi suffered from non-Hodgkin's lymphoma. He died from it March 7, 2001. His widow, Michelle Servi testified at the hearing that Servi had had cancer since 1981. It had never been in remission and "[h]e was always under medical care." She testified that "he did decide to go back" to KSM but "[a]fter he had called and talked to Dave Oechsner and found out the conditions of his returning . . . he change[d] his mind." Mrs. Servi testified, "it would have been financially devastating to us not—for him not to have health insurance." Mrs. Servi testified that "he couldn't go back under those circumstances of having to wait 60 days for the health insurance."[68]

Thus, this case involved an individual who Respondent knew to have a serious medical condition requiring continuous medical attention, and as is evident from his response to the recall offer, the delay in health care coverage motivated Servi to reject the offer. It is common knowledge that for many in Servi's circumstances, health care coverage is a more important condition of employment than wages or other working conditions. It is hardly a "fringe" benefit in such circumstances. An offer of reinstatement that delays benefits (more than) 60 days is substantively and materially deficient compared to the offer Servi was legally entitled to receive and would have received in the absence of KSM's unlawful delay in reinstatement. These circumstances render inapposite the decision by ALJ Judge Kennedy in *Desert Aggregates, Inc.*, 32–CA–18653, (NLRB Div. of Judges, Nov. 2, 2004), relied upon by Respondent. In that case Judge Kennedy found that an offer of recall to a "manipulat[ive]" discriminatee that included a 90-day delay in health coverage eligibility did not invalidate the offer where the Judge found that the health insurance issue "inconsequential to the discriminatee," and "had no value for him." In the instant case, health insurance was of great significance to Servi.[69]

The offer was invalid and Servi's rejection had no impact on Respondent's duty to reinstate him or his continuing backpay accrual.[70]

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maintained COBRA coverage since the commencement of the strike) were not eligible for insurance benefits until "the first of the month following sixty days of employment." This was based on KSM's application of provisions of the current health insurance plan, unilaterally implemented during the strike, that required the 60 day waiting period for "new" employees. (Tr. 1316). In the underlying decision in this case, the Board found that KSM's unilateral implementation of the new health care plan violated the Act. *KSM*, supra at 134–135. The previous plan, in effect at the strike's commencement, provided for a 30 day waiting period for new employees. While it is not clear that such provisions apply to returning strikers, this was the position KSM articulated to the Union, and at trial. The more salient point, as set forth in the text, is that if Servi was promptly recalled after the strike—as KSM concedes it was required to have done—Servi would not have had a waiting period before being covered by the health plan.

[68] I credit this testimony. Respondent broadly objected to Michelle Servi's testimony on grounds of hearsay. I overrule the objection because I find it unnecessary to rely on any testimony of Michelle Servi that constitutes hearsay. As discussed, Servi's reaction to the invalid offer is irrelevant. However, if his reaction is considered, it is demonstrated in the letter Servi wrote to KSM rejecting the reinstatement offer. This letter independently establishes his motive for not accepting KSM's reinstatement offer. There was no objection to the admissibility of the letter.

[69] As Oechsner admitted, and as common sense suggests, KSM could have chosen, without regard to the underwriter, to serve as a guarantor for Servi's medical expenses for the 60 plus days at issue. Respondent's attribution of the problem to the underwriter is a red herring. Moreover, I question the validity of KSM's assertion that the health insurance plan required that returning strikers to wait 60 or 30 days, and then to the first of the next month, to resume coverage. That may have been its practice (although the record does not speak to another strike, so this may well have been a matter of first impression), but nothing in the plan appears to require it. Respondent appears to be applying eligibility provisions that apply to "new" employees, which, of course, the strikers are not. (GC Exh. 121 at 4-1) Another provision provides that an employee returning to work after a "layoff or approved leave of absence" within 90 days of loss of insurance coverage may resume coverage on the next "first of the month" but the returning strikers had been neither laid off nor on an approved leave of absence.

[70] Respondent attacks the conclusion that the insurance waiting period was the motive for Servi's failure to accept KSM's reinstatement offer, asserting that Servi was earning more at his interim employer, Perlick Corporation, than he would at KSM. But, as Mrs. Servi testified, the job at Perlick was inferior because it was a second-shift position, "which was hard on us" and he did not receive the 4 weeks vacation that he had earned with his 21 years seniority at KSM, and which he "cherished." KSM points out that Mrs. Servi did not consider trying to put Servi on her employer's insurance for the 60 day period, but Mrs. Servi said that with his health history she did not believe that her insurance would or (in 1999) was obligated to cover him. Respondent questions why Servi did not pay for COBRA from Perlick to get him through the 60 days, but Mrs. Servi explained that they had lost all their savings paying COBRA during the strike and it "would have been another financial hit to us to pay COBRA" again. Respondent is quibbling. Servi explained in his letter to Oechsner why he did not accept the reinstatement offer.

3. The order of reinstatement

The General Counsel asserts and Respondent concedes, that at strike's end it was required, but failed, to reinstate strikers to available positions, including positions held by unprotected strike replacements. The parties agree that backpay is owing to each striker whose position was available at the strike's conclusion. The parties also agree that at strike's end there were not sufficient available positions for every striker and that those remaining strikers were entitled to recall as positions became available. The parties disagree on the order in which these unreinstated strikers should have been reinstated. KSM disputes the compliance specification's premise that employees should have been recalled to available positions within their pre-strike department classification in order of their plant-wide seniority. KSM contends that the more appropriate order of recall was the one KSM utilized (albeit with delays and inconsistencies that in some cases admittedly result in liability) of recalling unreinstated employees based on whom KSM believed to be the most qualified of eligible employees. In this regard, KSM contends that it followed the recall provisions of the expired collective-bargaining agreement in recalling employees as openings arose. Respondent asserts that in its weekly management meetings, if it determined that work justified the recall of a striker, management would make a group decision regarding the most qualified unreinstated striker in the classification. That employee would then be recalled without regard to seniority. If, in management's view the qualifications of unrecalled strikers were approximately equal, then management would look to seniority as a tie breaker.

In considering the competing positions, the Board's disposition of a very similar dispute in *Alaska Pulp*, is instructive. In *Alaska Pulp*, the Board explained:

> Our objective in compliance proceedings is to restore, to the extent feasible, the status quo ante by restructuring the circumstances that would have existed had there been no unfair labor practices. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). Determining what would have happened absent a respondent's unfair labor practices, however, is often problematic and inexact. Several equally valid theories may be available, each one yielding a somewhat different result. Accordingly, the General Counsel is allowed wide discretion in selecting a formula. This does not mean, however, that the Board will always approve the General Counsel's backpay formula even if it is reasonably designed to arrive at the approximate amount of backpay due. Rather, where the Respondent, as here, urges the Board to adopt an alternate formula, the Board will determine which is the "most accurate method" of calculating backpay, in view of all of the facts adduced by the parties. If, due to the variables involved, it is impossible to reconstruct with certainty what would have happened in the absence of a respondent's unfair labor practices, we will resolve the uncertainty against the respondent whose wrongdoing created the uncertainty.

326 NLRB at 523 (footnotes omitted). See also, *Parts Depot, Inc.*, 348 NLRB 152 (2006) ("Our objective in compliance proceedings is to restore, to the extent feasible, the status quo ante by restoring the circumstances that would have existed had there been no unfair labor practices").

Thus, the "wide discretion" afforded the General Counsel in selecting a backpay formula is bounded by Board's desire to utilize the "most accurate method" of calculating backpay. This means the "objective" is "to restore, to the extent feasible, the status quo ante by restructuring the circumstances that would have existed had there been no unfair labor practices. In considering this question, the issue is not whether KSM's practice of calling back the unreinstated striker it deemed most qualified was independently lawful or unlawful, but "[r]ather, the issue is whether the merit rankings by the Respondent accurately reflect the order in which the Respondent would have recalled the strikers, under a lawful plan, to their pre-strike or substantially equivalent positions." *Alaska Pulp*, supra at 523.

In this case I accept the General Counsel's position that recalling strikers in order of seniority within classification is the most accurate reconstruction of what would have happened in the absence of unfair labor practices. I reach this conclusion for the following reasons.

First, Respondent admits it as to the strikers who should have been recalled immediately at the conclusion of the strike. Thus, Respondent's answer to the compliance specification, and its summary exhibit, R. Exh. 39, set forth a backpay formula that provides for the most senior strikers in each job classification to receive backpay—one striker for each working unprotected replacement, starting with the most senior striker and continuing down the seniority roster until there is one striker accruing backpay for each unprotected replacement working in a given classification. Respondent offers no explanation as to why seniority by job classification is the appropriate method of recall to vacancies at the end of the strike, but not for vacancies that develop subsequently. If recall of the most qualified is the operative principle then Respondent would have taken the position that the most qualified—not the most senior—in each department should have begun accruing backpay when they were not reinstated at strike's end. Notably, when Respondent recalls a senior striker (who Respondent admits had been accruing backpay) without displacing an unprotected striker, Respondent takes the position that the next most senior unreinstated striker in the department begins accruing backpay.[71] Thus, throughout the recall period, even while Respondent is contending that the right to reinstatement should be based on relative qualification, it is willing to rely on seniority to determine the right to reinstatement to a position held by an unprotected replacement. No rationale is offered by Respondent for accepting that working unprotected replacements trigger a right

Somewhat relentlessly as to this discriminatee, Respondent also contends that Servi's failure to accept KSM's offer constituted a failure to mitigate his damages. However, Servi did mitigate his damages. Instead of accepting KSM's invalid offer he remained at his interim employer until he was too ill to work where he received health insurance, wages, and disability payments until his death.

[71] See, e.g., R. Exh. 39 at page 1, "Brake Slots," where Respondent starts striker Dennis Benke's backpay on January 5, 1998, upon the reinstatement of senior striker David Krull; also reflected in KSM's answer to amended compliance specification, ¶ 5(a)(iv).

to reinstatement for strikers in order of seniority, while Respondent can choose "the most qualified" for any other available position. And when unprotected replacements left, Respondent did not necessarily offer reinstatement to the senior employees that Respondent admits had been accruing backpay and entitled to those positions.[72] Another way to view Respondent's position is that it accepts the principle of reinstatement by seniority in cases where the principle is theoretical, i.e., in instances where Respondent unlawfully failed to reinstate a striker and allowed an unprotected replacement to keep working. But opposes the General Counsel's methodology, in any instance where it actually reinstated a striker. In that case, Respondent claims the right to reinstate the most qualified of the unrecalled strikers from the relevant department. The arbitrariness and incoherence of Respondent's model weighs against its adoption.[73]

Second, Respondent's proposed and highly subjective method of recall (something I discuss below) was carried out in a context where its decisions were hopelessly confounded with its admittedly unlawful conduct. Thus, Respondent's position is that in each case it called back the "most qualified." But Oechsner admitted (as he obviously had to) that had Respondent immediately displaced the unprotected replacements after the strike, there is no way to know what Respondent's hiring needs would have been when they were ready to reinstate additional strikers. This is an obvious point, but it highlights that Respondent's unlawful failure to reinstate strikers in October 1997 inextricably impacted the selection of strikers later in the recall process. Thus, the unlawful discriminatory failure to recall strikers in October 1997 taints the subsequent unilateral decisions on reinstatement that Respondent seeks to validate. Indeed, as unprotected replacements continued working beyond the time the last striker was offered recall, Respondent's unlawful refusal to displace the unprotected replacements with strikers framed and shaped its recall choices in every instance throughout the recall process. Thus, far from providing "the most accurate reconstruction of what would have happened in the absence of Respondent's unfair labor practices," the choices made by KSM using its recall method are infected by and of a piece with its unfair labor practices.[74]

Third, particularly given the previous point, the utter subjectivity of Respondent's recall procedure is troubling. As described by Oechsner and William James, then vice-president of operations, Respondent's recall determinations were made by a "management team" that met at least weekly on an array of production matters. When managers felt that available work required an additional employee the team would look at a list of unreinstated strikers from the relevant department and choose the one that was most qualified in terms of the particular work facing the department. James described an informal process:

> "Well, you know, how it usually would happen is either Phil Davis or myself from the shop floor end would say "We are going to need somebody". You know, "We are going to need—we are going to have to start up a second shift in painting to handle this". . . . [I]mmediately after the strike we had the recall list and then we would see if one of those people would -- that would be Dave[Oechsner]'s input. He would say "We got so-and-so out here. Weren't they a painter"? Something like that."

Where the qualifications of two unrecalled strikers were deemed, in the team's view, to be approximately equal, then the team would select the most senior striker for reinstatement. At trial, this basic description of the recall process was repeatedly invoked by Oechsner for every recall decision he was asked about. Oechsner's testimony made clear that the process was not to determine whether two (or more) unrecalled strikers were capable or qualified to do the work required, but, rather, who was "the most qualified" or "more skilled" employee, or the one "better than anyone else that was on the list" from the relevant classification. (Tr. 1145, 1147, 1159, 1175, 1180). As Oechsner explained it,

> Well, as our routine was, we would look at the available workers, we would look at the -- well, first we'd look at what was the work available, what did we want done, what did we need to have done, and then we looked at the available workers and made a determination as to who had the most skill and ability to perform that work. And that's how we did it."

The informality of the process is corroborated by the fact that Respondent offered not one piece of documentary evidence corroborating any details of these weekly meetings. No notes of the meetings or the consideration provided to these recall issues were introduced. Perhaps none exist. The ad hoc quality to the "qualification decisions" relied upon by KSM stand in sharp contrast even to the merit selection process relied upon by the employer in *Alaska Pulp*, supra, which "merit-rated

[72] See, e.g., R. Exh. 39 at page 4, "GF Slots," where after 2 unprotected replacements were laid off reinstatement was offered to employee Manuel Guerrero notwithstanding Respondent's position that no unprotected replacement had been displacing him; answer to amended compliance specification at 5(d)(vi); see also Tr. 1158–1160 where Oechsner is clear that Guerrero was recalled over other senior unrecalled strikers to fill vacancy created by the departure of unprotected replacements based on qualifications.

[73] I note that Respondent has not claimed that the unprotected replacements formally replaced individual strikers in order of seniority and therefore seniority is the applicable principle for apportioning backpay where unprotected replacements remained working. This contention is not only unargued, it is fantastic, as it would concomitantly require the presumption that the protected replacements replaced only the most junior employees. There is no evidence for either proposition. I recognize that R. Exh. 3, a chart created by Oechsner and provided to the Region during the compliance investigation, lists one unprotected replacement by the name of one striker (in order of seniority) and this chart was likely the basis for the subsequent creation of Respondent's backpay chart (R. Exh. 39). But R. Exh. 3 was also created to aid in liability analysis, not as a means of determining who should be recalled or who was replaced by whom. In this regard, it is notable that on R. Exh. 3, the protected replacements—i.e., those who lawfully replaced strikers—are set forth separately and there is no indication that any particular striker was actually replaced by them. The unprotected replacements are aligned with a senior unrecalled striker because Respondent agrees the senior striker is entitled to backpay as long as an unprotected striker is working.

[74] This is true even assuming that KSM's "most qualified" method of recall would not be independently unlawful.

[employees] according to various criteria and gave each employee a numerical ranking within his or her former department." *Alaska Pulp*, 296 NLRB 1260, 1263 (1989). Here, Respondent's choices on recall reflect an unfettered and unverifiable discretion on recall decisions. This would be less of a concern if Respondent was making these decisions in a context free of unfair labor practices, but it was not. Indeed, as referenced, above, the exercise of this discretion is inextricably shaped by its unlawful failure to reinstate strikers at the conclusion of the strike.

Both Oechsner and James insisted that in recalling strikers they followed the procedures of the expired labor agreement, specifically, Article IX, section 4. However, there is no evidence that the parties intended this provision to apply to reinstatement of strikers. By its terms it applies "[w]here the Company finds it necessary to lay off employees . . ." and, of course, reinstatement after an unfair labor practice strike is not the product of a layoff. Section 4 concerns recalls that follow layoffs, and explicitly provides for employees to be recalled, according to Section 4(E) "in the reverse order in which they were laid off, in accordance with their seniority in their classification in accordance with 'A' of this Section." Section 4 covers recalls, but anticipates a recall that is a response to a layoff, not a strike.

But even assuming, wrongly by all evidence, that this provision was intended to be applicable to striker reinstatement, I think KSM stretches this language farther than it will reach. While the contract language does not provide for recall or layoff strictly by seniority, it also does not, fairly read, anticipate the ad hoc discretion to chose the "most qualified" that KSM claims it exercised in this instance.

The expired contract provides that "Employees shall be shall 'be laid off and recalled on the basis of their seniority as established in their classification in accordance with "A" of this Section." Article IX, Section 3(B). Section A provides that factors the employer shall consider:

> A) Where the Company finds it necessary to layoff employees, the following factors shall be considered by the Company:
>
> 1. Qualifications, which shall be defined to mean present ability to perform the work available in a good, efficient, and workmanlike manner demonstrated by prior experience or training with the Company. An employee who meets such qualifications shall be deemed "qualified" for purposes of this Section.
>
> 2. Seniority in the affected classifycation or plant wide seniority whichever is appropriate.
>
> When as between two or more employees, Factor "1" (Qualifications), is approximately equal , Factor "2" (Seniority) shall govern.

Respondent's entire argument is based on its reading of this last quoted paragraph. However, it is apparent from Oechsner and James' description of the recall process, and from a reading of the entire Section A as a whole, another way to interpret the language is that an employee is "deemed 'qualified,'" i.e., possesses the "qualifications" for the position, expressly defined as the "present ability to perform the work available in a good, efficient, and workmanlike manner demonstrated by prior experience or training with the Company." Under this standard, employees being recalled to prior positions would—except in very unusual circumstances not relevant here—all be "qualified" with approximately equal qualifications as they are all able to "perform the work available in a good, efficient, and workmanlike manner." Under this view, this recall provision is essentially a seniority recall provision with the condition that seniority must give way to a review of employee's qualifications to perform the work. Although not the only interpretation of this clause, it is a compelling one. What is unique, and untenable, I believe, is KSM's position that this language permits it to recall the employee it views as "the most qualified" in every instance, without a nod to the definition of "qualifications" set forth in the language. Notably, there is no evidence that KSM considered the definition of qualifications set forth in the language of the expired contract. Thus, I reject Respondent's contention that its method of recall is the one for which the parties previously bargained.

Fourth, while Respondent's witnesses asserted, without rebuttal, that this recall policy had been used in the past, no examples were provided, and no documentary evidence corroborates this claim. I accept that there were past recalls in which people were not recalled in accordance with strict seniority. But there is no evidence that in the past a recall of any magnitude was carried out in the ad hoc fashion that striker's recall was undertaken. To the contrary, there is documentary evidence suggesting that, both before and after the strike, classification seniority was followed with regard to layoffs. Thus, a KSM list entitled "Callback Effective January 20, 1997" was stipulated into evidence by the parties which appears to list, by strict seniority within classification who will be working and who will be on layoff as of January 20, 1997. In each classification, it is only the junior employees who are on layoff.[75] Similarly, after the strike, in 2002 and 2004, plant wide seniority within classifications was followed in layoffs with junior employees within each classification being scheduled for layoff unless they were able to bump more junior employees in another classification. (See, GC Exh. 6-8). In those two cases, Oechsner admitted, plant seniority within classification was the basis used to determine who would be laid off. Thus, the only documentary evidence introduced at trial demonstrates the use of seniority within classification as the basis for layoffs. KSM's contention that the contract calls for recall of those KSM considers the most qualified is uncorroborated by any

[75] This document was likely generated before the strike. This document was stipulated into evidence without testimony that could provide greater context. Having said that, the stipulation into evidence demonstrates its authenticity and does show the anticipated reliance on seniority.

definitive examples, except for KSM's reinstatement of strikers.

Respondent contends that its version of the contractual recall provisions is undisputed. This is not so. Oechsner testified that the Union grieved the issue in the past and that the case went to arbitration. No party saw fit to introduce into evidence a copy of the award or the positions they took in the grievance proceedings. However, it does suggest that Respondent's view was not accepted by the Union. Moreover, although the matter was not part of the case before me, the parties stipulated that a charge had been filed and a complaint issued and pending over the "seniority order in which employees are to be recalled." Given that, KSM's suggestion that its view of the correct way to apply the expired terms and conditions of employment is unchallenged is not so.[76]

In summary, the General Counsel's proposed order of recall for purposes of determining backpay is based on a method at least sometimes used by Respondent to effectuate layoffs and which objectively determines the order of recall for all strikers—whether they should have been reinstated at the strike's conclusion, or later as vacancies developed—based on the same principle. By recalling strikers based on seniority within the employees' respective classifications, the General Counsel's method ensures that the returning striker has the qualifications for the position, as they are being recalled in every case to a position they previously held. The striker may not be the "the most qualified" or skilled of all unrecalled strikers for the position, but the striker has demonstrated through past experience on the job the ability to perform that work in a reasonably competent manner. By contrast, Respondent proposes to use a method that, quite apart from how Respondent describes it, allows KSM the nearly unfettered discretion to choose who it reinstates, in a context where its choices are the product of an admittedly unlawful refusal to reinstate strikers at the conclusion of the strike, strikers KSM admits should have been reinstated by seniority. Respondent's rationale for this method, the expired collective-bargaining agreement, does not appear to offer support. In this context, Respondent's method of recall cannot be a reconstruction "what would have happened in the absence of respondent's unfair labor practices" because its choices are the product of its unfair labor practices. It is a method that Respondent proffers because it reflects what Respondent did and therefore its adoption would result in the minimum of liability for Respondent. That is not a sound basis for determining, to the extent possible, the method Respondent would have used to lawfully reinstate strikers had it not unlawfully denied reinstatement to so many at strike's end. Respondent's contention that Board law does not require the use of seniority and that absent discrimination "an employer can use any method of recall" (R. Br. at 51) is beside the point. The issue is not whether Respondent's recall method could violate the Act if considered in a different legal context. The issue is whether, in the absence of Respondent's unfair labor practices, its recall method approximates what would have occurred. For the reasons set forth above, Respondent's method fails to meet that test. I believe that the General Counsel's is the more accurate and I see no reason to modify it.[77]

C. General gross backpay issues

1. Beginning date for backpay period

In the underlying decision in this case the Board found that the Union conveyed the employees' unconditional offer to return to work on October 5, 1997. In terms of the backpay period for unreinstated strikers, the compliance specification alleges that (for employees for whom work was allegedly available), the backpay period begins October 5, 1997.

Respondent disputes this, contending in its answer to the compliance specification that,

> "[n]o backpay period should commence prior to October 12, 1997, the date one week after the Union's unconditional offer to return to work. The instantaneous recall alleged by the Amended Compliance Specification is impossible, and the Board's long-standing practice is to require reinstatement within five (5) working days, or one week."

The answer to this, of course, is that Respondent did not try. The "Board's long-standing practice" of permitting 5 days to reinstate strikers is designed "to provide a reasonable accommodation between the interest of the employees in returning to

[76] Finally, although the General Counsel does not take issue with it, I note that KSM's challenge to the General Counsel's methodology for the order of recall was not mooted in its answer to the compliance specification. Section 102.56(b) of the Board's Rules and Regulations defines what must be included in an answer to a compliance specification. It states, in pertinent part, as follows:

> As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.

Obviously the General Counsel's position that recall of strikers should have been by seniority within classification was a significant basis for disagreement between the parties. Respondent's premise for the disagreement—its view that the appropriate method of recall was based on the relative qualifications of strikers within a department should have been raised in the answer. It was not.

[77] I note that Respondent's suggestion on brief (R. Br. at 57–58) that the Region had previously agreed to Respondent's backpay methodology and that it was later rejected by the Region's new compliance officer in 2004 is without record support.

I also note that the General Counsel has merged certain job classifications for purposes of striker recall. Thus, General Factory 1, 2, and 3, are treated as one classification for purposes of recall. This is also true with regard to the merging of weld set up A, and weld production A & B into one recall list, but leaving weld set up B, weld utility, and weld spot A in their own separate classifications for purposes of recall. There is some, but not a lot, of justification for these choices set out in the record, and in some cases the choices may have backpay implications, especially in the welding classifications. In view of the fact that neither the Respondent nor the Union takes issue with the General Counsel's grouping of these sub-classifications (indeed, Respondent groups the classifications in similar fashion in R. Exh. 39), I will not substitute another grouping. The matter is complicated and the record not extensive enough on this matter for me to believe I could substitute a more precise formula.

work as quickly as possible and the employer's need to effectuate that return in an orderly manner." *Teamsters Local 574*, 259 NLRB 344 fn. 2 (1981). On the other hand, as the Board explained In *Drug Package Co.*, 228 NLRB 108, 114 (1977), enft. denied in part on other grounds 570 F.2d 1340 (8th Cir. 1978):

> in those instances [where] the employer has made it clear that it does not intend to reinstate the unfair labor practice strikers . . . there is no reason to permit it 5 days in order to effectuate an orderly reinstatement and the Board will not, in this circumstance, do so. The 5-day period is not to enable the employer to delay reinstatement or to obtain 5 days during which he is not required to pay backpay, but is in recognition of the practical difficulties he may face in reinstating the employees, when he is not in a position to know exactly when they may seek to return."

"[I]f an employer has rejected, attached an unlawful condition to, or ignored an unconditional offer to return to work, the 5-day period serves no useful purpose and backpay will commence as of the unconditional offer to return to work." *Teamsters Local 574,* supra; *Northern Wire Corp.*, 291 NLRB 727 fn. 5 (1988), enfd. in part, 887 F.2d 1313 (7th Cir. 1989); *Westpac Elec.*, 321 NLRB 1322 (1996). In such case the backpay obligation begins from the date of the unconditional offer to return to work. *Northern Wire Corp.*, supra; *La Corte ECM*, 322 NLRB 137 (1996); *Newport News Shipbuilding*, 236 NLRB 1637, 1638 (1978), enfd. 602 F.2d 73 (4th Cir. 1979).

In this case, Respondent offered reinstatement to only 3 strikers within the 5 days after the unconditional offer to return. None of those was reinstated within the 5-day period. Respondent failed to reinstate any employees within the 5 day, or even 7 days, following the offer to return. Within the first 30 days, only 10 strikers were offered reinstatement, although 25 unprotected replacements continued working. Thus, the 5-day grace period the Board provides to reinstate strikers "serves no useful purpose and backpay will commence as of the date of the unconditional offer to return to work."

2. Cessation of backpay for those accepting, declining, or failing to respond to an offer of recall

In terms of the cessation of the backpay period, the General Counsel takes the position that for employees who ultimately returned to work at KSM, the backpay period ended when the employee actually returned to work, not on the date that a valid offer of reinstatement was made by KSM. For employees who declined an offer of recall, the General Counsel contends that the backpay period ends on the date that the employee advised Respondent of the decision to decline recall. These parameters are in accordance with settled Board precedent. *Cliffstar Transportation Co.*, 311 NLRB 152, 154–155 (1993); *Southern Household Products Co.*, 203 NLRB 881, 882 (1973).[78]

I would note that the General Counsel also contends that for employees who failed to respond to an offer of recall, generally the backpay period ends on the date set by Respondent to provide a response to the offer of reinstatement. This issue was not litigated, or disputed by any party, and Respondent's letters usually sought a response within 3 business days of receipt of the letter. Although there was some variation, typically these letters, from Oechsner, requested that the employee "please contact me within three business days following receipt of this letter to discuss your possible date of return."

I doubt that this provides a "reasonable time" for an employee receiving an offer of reinstatement to consider the offer before backpay tolls. See *Cliffstar Transportation. Co.*, supra (ten days reasonable); *Esterline Elecs. Corp*., 290 NLRB 834 (1988) (10 days reasonable). Under current Board law an otherwise valid offer is not invalidated by the requirement of a short-response time, but backpay will not toll until the passage of a "reasonable time." Given the absence of any litigation on this issue I will not adjust any backpay dates on this ground.[79]

3. Discriminatees' right to recover expenses for out-of-pocket interim health care premiums

The General Counsel alleges that the backpay owed employees includes the out-of-pocket cost of health care premiums paid by employees for themselves and/or their families during

[78] In its answer to the compliance specification Respondent's pleadings indicate that backpay should be tolled on the date Respondent mailed or conveyed by telephone an offer of reinstatement. It does not pursue this argument on brief. In any event, I would reject such an argument. Termination of the backpay period on the date a reinstatement offer is made—even before it is received by the discriminatee—does not appropriately consider the circumstances of the discriminatee, who, it cannot be forgotten, is in these circumstances on account of the wrongdoing of the employer. Board law recognizes that employees may require time to decide upon and accept or reject an offer of reinstatement. It is obvious then that the offer of reinstatement cannot immediately stop the tolling of the backpay obligation. In terms of backpay, the continuing adverse effects of the unlawful delay in reinstatement are tolled only upon the employee's return to work, not upon an offer of reinstatement. An employer cannot toll its backpay obligation as of the moment reinstatement is offered.

[79] I note that under *Esterline*, a recall offer that "suggests that the offer will lapse if a decision on reinstatement is not made by" response date is invalid. 290 NLRB at 835. The majority of KSM's letters offering reinstatement ask the employee to contact Oechsner if they want to be considered for the opening or to discuss the possible date of return. These letters cannot reasonably be understood as indicating that the offer will lapse if the employee does not respond within the 3 days. However, unlike the majority of offers of reinstatement sent to KSM employees, the offers sent by KSM to employees Curtis, Wetzel, Rettler, Sable, Stern, Eusch, and Wiedeman stated "[i]f you are interested in returning to employment with KSM, you must contact me within three (3) business days following receipt of this letter to discuss your date of return" (letters to Curtis, Eusch, Rettler, Stern, Wetzel, Wiedeman), or "[y]ou must contact me within three business days following receipt of this letter if you are interested in returning to employment at KSM." (letter to Sabel). Eusch, Wiedeman and Stern returned to work and therefore the validity of the offers of reinstatement are not conceivably at issue. However, Sable, Rettler, Wetzel, and Curtis did not. The offers put to them may be read to suggest that they lapse in the absence of a response within the unduly short period allotted. However, in the absence of any contention to this effect, any litigation on the subject, and a compliance specification that pleads backpay closure dates for the above employees that appear to be based on the employer's reinstatement offer, I think it would be unfair to Respondent to find that the backpay period continues for Rettler, Wetzel, Sable, or Curtis, and I do not reach this issue.

the backpay period that substituted for the KSM-provided insurance that would have covered employees had they been reinstated. Respondent does not dispute that the Board customarily includes reimbursement of substitute health insurance premiums in make-whole remedies for fringe benefits lost. See, e.g. *Aroostook County Regional Ophthalmology Center*, 332 NLRB 1616, 1618 (2001); *Cliffstar Transportation Co.*, supra at 166. However, Respondent contends that in this instance the discriminatees are not entitled to recovery of these costs, contending (R. Br. at 112–113) that the General Counsel unambiguously waived the right to recover these costs. KSM's contention is based on the October 3, 2006 Stipulation and Partial Settlement Agreement, in which KSM waived the right to contest the underlying Board Order in this case, and which was signed by the General Counsel, KSM, and the Union. The stipulation provides:

> "Respondent has not been able to reach agreement with the Board concerning the liability, if any, owing under paragraph 2(c) of the Board's September 28, 2001 Order (336 NLRB 133), as modified by its November 7, 2001 Order, which includes the lost pay and out-of-pocket medical expenses allegedly incurred by the strikers who were not recalled in a timely manner. Accordingly, Respondent reserves the right to a hearing before an administrative law judge to determine the amount due, if any, under paragraph 2(c) of the Board's September 28, 2001 Order, as modified, and to present any other compliance-related issues except those [relating to the resolved health care changes and bargaining positions referenced above]."

Respondent argues that "[t]his language is unambiguous." Respondent claims that "by its terms," the stipulation "provided that the only issues remaining for this proceeding are the 'lost pay and out-of-pocket medical expenses allegedly incurred by the strikers who were not recalled in a timely manner.'"

I think this is inaccurate. By its terms, the stipulation states that the parties failed to reach agreement concerning liability owing under paragraph 2(c) of the Board's Order "which *includes* the lost pay and out-of-pocket medical expenses." (emphasis added).

The issue comes down to the meaning of the word "includes." Respondent's contention is that the stipulation's description of subjects "include[d]" under paragraph 2(c) of the Board's order—the paragraph on which agreement was not reached—is intended to be an exhaustive list, and not an illustrative one. I think it is possible to read the word "include" to exclude everything else, but it is not the only, or the preferred, or the most likely meaning of the word. The relevant definition for "include" from Webster's Third New International Dictionary (1976) 1143—"to place, list, or rate as part or component of a whole or of a larger group, class, or aggregate"—is at odds with Respondent's contention. *Fowler's Modern English Language Usage* 387 (R.W. Burchfield ed., 3d ed. 1996) treats with the distinction between "include" and "comprise," and the discussion is relevant here. It is clear that R.W. Burchfield, at least, would look down at his nose at wordsmiths who intended what Respondent claims it, the General Counsel, and Union intended. According to *Fowler's*:

> "*comprise* is appropriate when the content of the whole is in question, and *include* only when the admission or presence of an item is in question: good writers say *comprise* when looking at the matter from the point of view of the whole, *include* from that of the part. With *include*, there is no presumption (though it is often the fact) that all or even most of the components are mentioned; with *comprise*, the whole of them are understood to be in the list."

Had the word "only" been appended to the word "include," Respondent's argument would have more traction. But in its absence, Respondent has no other argument as to why I should read a word that commonly describes "part of a whole or group" as meaning the entirety of the whole or group. I do think it a possible reading, but *nothing*—nothing in the paragraph as a whole, nothing in the stipulation agreement, and no extra-textual argument—suggests that Respondent's view is correct. The preceding sentence of the stipulation references the parties' inability to reach agreement on liability under paragraph 2(c), hardly language that prefaces a waiver. The subsequent sentence provides Respondent with an unqualified right to a hearing on what it owes under paragraph 2(c), without any attempt to limit or define the scope of paragraph 2(c) which, as noted, would be interpreted ab initio to cover out-of-pocket medical expenses. Nor is there any suggestion or basis to infer in the remainder of the stipulation agreement that the General Counsel waived the right to seek compliance with the full scope of Section 2(c), with the exception of the unilateral changes in health care clearly referenced and on which accord was clearly reached in the stipulation agreement. Finally, Respondent does not make any type of argument relying on parol or any other evidence beyond the text of the stipulation. It is noteworthy, in that regard, that the unrebutted testimony of the compliance officer was that discriminatees in this case did not receive any money under the settlement for lost benefits during their backpay periods. In this case, I think that the contention that the stipulation indicates a waiver of the right to otherwise reimbursable health care premiums is untenable. It is supported by nothing other than a dubious reading of the word "include" to exclude anything not mentioned.[80]

D. Mitigation and offset issues

A discriminatee is entitled to backpay if he makes a "reasonably diligent effort to obtain substantially equivalent employment." *Moran Printing*, 330 NLRB 376 (1999). In seeking to mitigate loss of income, a backpay claimant is held only to reasonable exertions, not the highest standard for diligence. The Board stated in *Flannery Motors, Inc.*, 330 NLRB 994, 995 (2000):

> A good faith effort requires conduct consistent with an inclination to work and to be self-supporting and that such inclination is best evidenced not by a purely mechanical examination of the number or kind of applications for work which have been made, but rather by the sincerity and reasonableness of

[80] Respondent's argument suffers by comparison to the stipulation's explicit waiver of the General Counsel's right to seek further remedy for the Respondent's unilateral changes in health care.

the efforts made by an individual in his circumstances to relieve his unemployment.

The principle of mitigation does not require success; it only requires an honest, good faith effort. *Fabi Fashions*, 291 NLRB 586, 587 (1988). Whether a claimant's search for employment has been reasonable is evaluated in light of all of the circumstances. *Pope Concrete Products*, 312 NLRB 1171 (1993), 67 F.3d 300 (6th Cir. 1995); *Cornwell Co.*, 171 NLRB 342, 343 (1968). It is measured over the backpay period as a whole, not isolated portions thereof. *First Transit Inc.*, 350 NLRB 825 fn. 8 (2007); *Wright Electric*, 334 NLRB 1031 (2001), enfd. 39 Fed. Appx. (8th Cir. 2002); *IBEW Local 3 (Fischbach & Moore)*, 315 NLRB 266 (1995). Any doubt or uncertainty in the evidence must be resolved in favor of the innocent employee claimant and not the respondent wrongdoer. *NLRB v. NHE/Freeway, Inc.*, 545 F.2d 592, 594 (7th Cir. 1976); *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 572–573 (5th Cir. 1966). The employer does not meet its burden of showing an inadequate job search by presenting evidence of lack of employee success in obtaining interim employment or of low interim earnings. *United Food & Commercial Workers Local 1357*, 301 NLRB 617 (1991).

KSM challenges the mitigation efforts and conduct of certain employees and argues that the alleged backpay set forth in the compliance specification should be limited as to these employees. I consider each of KSM's mitigation-related challenges herein. In addition, I consider a few miscellaneous changes to the backpay figures advanced by the General Counsel in his brief.

1.Failure to commence mitigation efforts (Laverne Jung & Norbert Jahn)

As discussed above, Norbert Jahn resumed work at KSM on October 20, 1997. The record shows that KSM called Jahn on October 17—12 days after the unconditional offer to return to work—and reached his mother who "stated Norb was ready and willing to get back to work." KSM told Jahn's mother to have Jahn report to work October 20, and he did. Laverne Jung resumed work at KSM on December 1, 1997. He received his offer of recall 2 weeks earlier on November 14, in a letter from KSM dated November 12, offering him recall effective December 1. The record suggests that Jung responded by phone the day he received the letter, presumably accepting the offer of recall. (In the record, the notes of the conversation are covered by a photocopy of Jung's signed receipt of the offer of employment. See GC Exh. 4.) Based on the compliance specification, neither Jahn nor Jung had interim earnings before they returned to work. The General Counsel seeks backpay for the period October 5 through December 1, 1997 for Jung, and October 5 through 20, 1997 for Jahn.

Respondent disputes the backpay alleged for each on the same grounds: at the hearing both Jahn and Jung indicated in response to questioning that they did not look for interim employment during the periods before they were recalled. On that basis, Respondent contends that neither Jung nor Jahn is eligible for backpay as the record demonstrates that no effort of any kind to mitigate their losses was made during this time.

In response to Respondent's argument, the General Counsel cites a number of cases that suggest that "a discriminatee is not required to seek work instantly," but these cases all make a different point. These cases involve circumstances where a discriminatee undertook efforts to mitigate after a delay in seeking work. It is in that context that the Board has repeatedly held "that an employee discriminatorily [terminated] need not instantly seek new work; rather the test is whether, on the record as a whole, the employee has diligently sought employment during the entire backpay period."[81] The issue raised by Respondent is different: it involves discriminatees who did not seek employment at any time during their (short) backpay period.

The General Counsel contends that the former strikers' "obligation to mitigate their damages did not begin for a reasonable amount of time after strikers would have realized they would not be recalled and thus [that] they had an obligation to search for work." (GC Br. at 115). While I think that the General Counsel's proposed rule is too expansive, I do agree that a rule of reason should apply. The rule of mitigation is rooted in the Supreme Court's view "that deductions [in backpay] should be made not only for actual earnings by the worker but also for losses which he willfully incurred." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198 (1941). The Board's discretion in these matters has as its purpose "not so much the minimization of damages as the healthy policy of promoting production and employment." *Phelps Dodge*, supra at 199–200. These goals counsel against a rule that treats *any* delay in seeking work by an employee as an opportunity to lessen damages owed by an unfair labor practitioner. That is not the point. Rather, the issue is whether the discriminatee has removed himself from the employment market and may be deemed to have willfully incurred losses.

As noted, Jahn was offered recall and indicated acceptance October 17, 1997, 12 days after the strike ended. Jung accepted the offer of recall November 14, but was not asked to report until December 1.[82]

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[81] *A. S. Abell Co.*, 257 NLRB 1012, 1015 (1981); *Colorado Forge Corp.*, 285 NLRB 530, 538 (1987); *C-F Air Freight, Inc.*, 276 NLRB 481, 481 fn. 3 (1985); *I.T.O. Corp. of Baltimore*, 265 NLRB 1322, 1323 (1982); *Nickey Chevrolet Sales, Inc.*, 195 NLRB 395, 398 (1972), enfd. 493 F.2d 103, 108 (7th Cir. 1974), cert. denied 419 U.S. 834 (1974); *Saginaw Aggregates*, 198 NLRB 598 (1972) enfd. mem. 482 F.2d 946 (6th Cir. 1973); *Keller Aluminum Chairs*, 171 NLRB 1252, 1257 (1968), 425 F.2d 709 (5th Cir. 1970). See, *Smyth Manufacturin*g, 277 NLRB 680, 681 (1985). (no tolling where discriminatee turned down first job offer and accepted subsequent job offer although this delayed commencement of interim employment for 2 weeks).

[82] I note that the failure to seek interim employment while waiting for a job to start generally is not a basis for tolling backpay. *EDP Medical Computer Sys.*, 302 NLRB 54, 58 (1991) (no tolling where discriminatee had to wait 6 weeks for new job to start and did not search for work at all during backpay period), enfd. w/o op., 959 F.2d 1101 (D.C. Cir. 1992);.see *Smyth Manufacturing Co.*, 277 NLRB 680, 681 (1985) (no tolling of backpay where discriminatee turned down job offer in favor of an offer that commenced 2 weeks later). *Grosvenor Orlando Associates*, 350 NLRB 1197, 1202 (2007) demonstrates that it is not always the case that a discriminatee who secures interim employment that does not commence for a few weeks may cease searching

After a 9 month strike, I believe (and Respondent, who bears the burden of showing inadequate mitigation efforts, did not show otherwise), that Jahn and Jung reasonably may have concluded (correctly, it turned out) that Respondent was preparing to recall them and that a search for interim work in that short time period would be unnecessary. It should be remembered in this regard that on or about October 16, the Employer solicited from all employees their availability for recall, suggesting that recall would be forthcoming to those who responded affirmatively. Jung answered affirmatively. This inquiry would have only encouraged employees to believe that recall was likely and imminent.

This is one important distinction between this case and the Board's recent decision in *Grosvenor Orlando Associates*, 350 NLRB 1197 (2007). In *Grosvenor*, a Board majority found that striking employees who were discharged and who did not commence a search for interim employment within 2 weeks after their discharge should have backpay tolled until such time as they began looking for interim employment. In reaching this result, the Board emphasized that it was not choosing a rule to be rigidly applied, but rather, was assessing the circumstances in that case. Notably, the Board in *Grosvenor* found that "there is no evidence that the Respondent engaged in any conduct that would warrant any optimism about the prospect of reinstatement and thus justify a further delay in the initial search for interim work beyond a 2-week period." *Grosvenor*, supra at 1200. To the contrary, in *Grosvenor*, the Board found that the strikers' backpay period began when the Respondent sent a letter to the strikers that effectively discharged the strikers. This affirmative action by an employer to *discharge* striking employees obviously suggests that reinstatement is not in the offing. It is the opposite of suggesting the possibility of reinstatement. The instant case is very different. Here, at strike's end Respondent issued a letter to each former striker seeking information "concerning your personal intention to be considered for recall." An employee who had not sought or not obtained interim employment during the strike would, in view of Respondent's letter, be likely to delay a search for interim employment after the strike in anticipation of recall. The strike ended on October 5, and it would have been a reasonable presumption of employees, particularly in view of Respondent's October 16 correspondence, that reinstatement was in the offing.

The question, in my view, is whether it is reasonable to conclude, looking at Jahn and Jung's limited backpay period as a whole, whether the failure to seek work during this initial period after the strike proves an inclination not to mitigate damages. Under the circumstances, employees recalled in this time period cannot reasonably be said to have willfully incurred wage losses by not seeking work after the strike. They did not demonstrate a commitment to idleness and lack of productivity which Board policy is directed towards deterring. I do not limit Jung or Jahn's backpay for failure to mitigate during the time before they were reinstated.

for work. But in *Grosvenor* the delay between finding and assuming work was longer than the 3-day (Jahn) and 2-week (Jung) lag involved here.

2. Adequacy of mitigation efforts (Hans Eusch and James Malson)

Respondent contends that discriminatees Hans Eusch and James Malson failed to engage in a reasonably diligent search for interim employment, and their backpay should be limited accordingly. Respondent also contends that Eusch's backpay should be tolled because Eusch turned down an offer of employment during his backpay period. Each of these discriminatees testified to seeking work during the backpay period. However, KSM contends that their efforts did not satisfy the Board's standards and that backpay should be limited.

Hans Eusch. Eusch failed to work during his backpay period, which, according to the specification began on December 1, 1997 and ended when he returned to work at KSM on February 8, 1999. Eusch testified that he applied for ten jobs during this period, beginning in January 1998. Eusch did not apply for any jobs in December 1997. Eusch testified credibly that based on Respondent's questionnaire soliciting interest in reinstatement he believed he would be recalled soon and "that's the reason why I didn't look for work during that period, because I didn't want to start a job and then have to quit right away." Eusch applied for no jobs after August 1998 until January 1999 when he applied for three positions. However, he did have an interview in October for a job he applied for in the spring of 1998. Eusch was offered employment at one industrial facility, Tecumseh Products, but the position offered was an unskilled general laborer position, at significantly less pay and without other benefits that Eusch enjoyed at KSM. Although it is not clear that Eusch was offered employment at Maysteel, he was told by Maysteel that he would have to resign from KSM in order to accept a position there and "guarantee that if I was recalled to work for KSM that I would stay at Maysteel."

While Eusch's search for work cannot be called zealous, such efforts are not required. As referenced, supra, his failure to succeed in obtaining interim employment is not a basis for demonstrating a lack of effort to obtain interim employment. *Aneco, Inc.*, 333 NLRB 691 (2001), enfd. in part, 285 F.3d 326 (4th Cir. 2002). His failure to seek work in December 1997 was attributable to his reasonable belief—based on KSM's solicitation of employees' interest in reinstatement—that he would soon be offered reinstatement at KSM.[83] In any event, a delay in initiating job search is not to be held against an employee, whose efforts must be considered in the context of his efforts throughout the backpay period. See, e.g., *Midwestern Personnel Service*, 346 NLRB at 625 (sufficiency of discriminatee's efforts to mitigate backpay are determined with respect to the backpay period as a whole and not based on isolated

[83] As discussed, supra, Respondent's solicitation of employees' interest in returning to employment after the strike ended distinguishes the circumstances here from those in *Grosvenor*, supra, where employees were discharged for striking. In *Grosvenor*, the Board found that there was "no evidence that the Respondent engaged in any conduct that would warrant any optimism about the prospect of reinstatement," and tolled discriminatees' backpay after a 2-week delay in searching for work. Here, 2 weeks after the strike ended Respondent was soliciting employee interest in returning, and Eusch relied upon this and anticipated he would soon be returning to work.

portions of the backpay period); *Colorado Forge Corp*., 285 NLRB 530, 538 (1987) and cases cited therein (discriminatee not required to instantly seek interim employment). From January through August 1998 Eusch applied to a variety of positions. He credibly explained why he turned down the position offered to him at Tecumseh, which clearly cannot be considered substantially equivalent employment given the significant difference in pay (nearly a 1/3 less pay) and benefits, and skill (a general laborer position), from his position at KSM. *Minette Mills, Inc.,* 316 NLRB at 1010 ("it is well established that a discriminatee's obligation to mitigate an employer's backpay liability requires only that the discriminatee accept substantially equivalent employment").[84] Similarly, Maysteel's insistence that Eusch resign from KSM in order to work there provides sufficient grounds for him not to take a position there. Eusch made no applications during the entire fourth quarter of 1998. But Board precedent does not reject backpay for discriminatees just because they ceased filing applications for a quarter. As the Board stated in *Cornwell Co.*, 171 NLRB at 343:

> A discriminatee who has otherwise made reasonable efforts to seek out new employment is not required in each specific quarter to repeat job applications which from her past efforts she knows are foredoomed to futility in order to protect her claim of backpay for that particular quarter. Rather, the entire backpay period must be scrutinized to determine whether throughout that period there was, in the light of all surrounding circumstances, a reasonable continuing search such as to foreclose a finding of willful loss.

After submitting no new job applications in the 4th quarter of 1998, Eusch submitted three new applications for employment in January 1999. I do not disagree that there are discriminatees who more actively made efforts to seek interim employment. However, it is also true that Respondent did not establish that there was plentiful interim work available for employees with Eusch's background (her worked as a tape operator). I cannot find that Eusch's efforts were so inadequate as to suggest that during his backpay period he was not engaged in "a reasonable continuing search such as to foreclose a finding of willful loss."[85]

James Malson: Malson's backpay period is October 5, 1997 to April 22, 1998, when he returned to work for KSM. Malson did not obtain interim employment during his backpay period. Malson testified that he applied to a significant number of jobs during his backpay period including numerous skilled welding jobs beginning in January 1998. Respondent questions Malson's testimony because his NLRB work search form did not reflect all of the applications to which he testified. However, Malson credibly explained the discrepancy. He testified that in preparing his NLRB form, submitted in 2002, 4 years after his return to employment at KSM, his wife simply copied from his work search forms supplied to state unemployment compensation authorities. Those forms only covered the period for which Malson received unemployment compensation, which was October into January 1998. Malson testified that he did not have accurate records demonstrating his job search for the period January through April 1998.[86] I found Malson's testimony credible in this regard and I accept his explanation. Moreover, "[t]he receipt of unemployment compensation pursuant to the rules regarding eligibility constitutes 'prima facie evidence of a reasonable search for interim employment.'" *Taylor Machine Products*, 338 NLRB 831, 832 (2003) (quoting *Birch Run Welding*, 286 NLRB 1316, 1319 (1987), enfd. 860 F.2d 1080 (6th Cir. 1988)) enfd. 98 Fed. Appx. 424 (6th Cir. 1987).

Respondent also contends that acceptance of Malson's explanation demonstrates that from the strike's end in October through December 1997, Malson did not apply for skilled welding positions but rather, lower skilled positions including entry level service sector jobs. I think that under the circumstances, this observation is inadequate to prove that Malson did not make a reasonably diligent effort to mitigate his backpay losses. As noted, supra, his effort must be evaluated based on the total backpay period, not just a particular quarter. As also noted supra, an employee is not required to begin his job search instantly with the start of the backpay period. Here Malson did instantly begin a job search and actively sought work during the entire backpay period, but waited 3 months into his job search, until January 1998, to look for high skilled, substantially equivalent work. Prior to that time, Malson's search appears to have been for jobs with less skill and likely involving more turnover and less permanence than more highly skilled welding jobs. Given the uncertainty surrounding KSM's recall intentions after the strike—uncertainty generated by KSM—Malson's job search, viewed over the course of the backpay

[84] KSM points out that Eusch was willing to seek other noncomparable work, such as work as an insurance adjuster, that was *more* unlike his KSM tape operator position than the Tecumseh general laborer position. An unwillingness to accept a physically arduous general laborer position, while seeking work as an insurance adjustor, is not hard to fathom. In this regard, there is, and should be, an asymmetry in a discriminatee's mitigation obligations: to satisfy his duty to mitigate, an employee is required to accept only substantially equivalent employment, but may look for and accept work more broadly. *Fugazy Continental Corp.*, 276 NLRB 1334, 1336 (1985), enfd. 817 F.2d 979 (2d Cir. 1987). The question is whether the job search was conducted in good faith, with sincerity and an inclination to work and be self-supporting. In the case of Eusch, KSM has failed to prove otherwise.

[85] It is useful to compare Eusch's search to some cases where the Board has found the discriminatee's search inadequate. In *Glenn Trucking Co.*, 344 NLRB 377 (2006), the Board found that a discriminatee had failed to be reasonably diligent in seeking to mitigate where he failed to seek any employment after the first few months of the backpay period and went for nearly a year with no evidence of job search efforts. In *Moran Printing, Inc.*, 330 NLRB 376, the Board an employee had failed to mitigate where he signed the union's "out-of-work" book only twice and gave discredited testimony about his job search efforts. Eusch's efforts compare favorably with these examples.

[86] Employees are not disqualified from backpay "because of their poor record-keeping." *Allegheny Graphics*, 320 NLRB 1141, 1145 (1996), enfd. 113 F.3d 845 (8th Cir. 1997); *Midwestern Personnel Services, Inc.*, 346 NLRB at 628 ("The Board has ruled a discriminatee's inability to recall the names of places they searched for work or to maintain records of such after a long period of time does not establish a failure to mitigate damages"), citing *United States Can Co.*, 328 NLRB at 356.

period, does not warrant a reduction in backpay for failure to take reasonable mitigation efforts.

3. Resignations from interim employment
(Thomas Cooper, Lawrence Wetzel, Allen Curtis, Anthony Bannenberg)

Respondent contends that discriminatees Cooper, Wetzel, Curtis, and Bannenberg failed to properly mitigate based on the fact that they obtained but then quit interim employment during their backpay periods.

As KSM points out, it is established Board policy that a discriminatee is deemed to have willfully incurred loss of income by voluntarily relinquishing interim employment "without compelling or justifying means." *Knickerbocker Plastic Co.*, 132 NLRB 1209, 1212 (1961). However, it is equally well settled that a discriminatee does not incur a willful loss of earnings by quitting an interim job for justifiable reason. *Florida Steel Corp.*, 234 NLRB 1089, 1092, 1094–1095 (1978). It is also established Board precedent that a discriminatee "is under no obligation to retain non-equivalent employment, once secured, regardless of the conditions under which the employee was required to work." *Churchill's Supermarkets*, 301 NLRB 722, 725 (1991). Generally, in assessing whether the discriminatee has failed to adequately mitigate, the Board will look to the reasons that an employee has given up an interim position. "When a backpay claimant quits interim employment, 'the burden shifts from the Respondent to the Government to show that the decision to quit was reasonable.'" *First Transit Inc.*, 350 NLRB 825, 826 (quoting *Minette Mills, Inc.*, 316 NLRB at 1010); *Parts Depot*, 348 NLRB at 154.

Thomas Cooper: Cooper worked for KSM in a maintenance position prior to the strike. General Counsel alleges that his backpay period runs from October 5, 1997, through February 16, 1998, when he returned to work at KSM. In September 1997, Cooper began working at a foundry called Craft Cast, where he earned the same amount as he had at KSM.

Within 60 days, in November 1997, Cooper quit his job at Cast Craft. In its brief, KSM quotes Cooper saying that he quit Cast Craft because "it wasn't fun" and argues, correctly, that finding work at a foundry not to be "fun" does not establish good cause for quitting interim employment. Respondent cites Cooper's concerns about "poor lighting and glue being kept in a refrigerator" and states that while these "may justify a complaint to a manager, they are not conditions that justify a resignation." Respondent offers a startling unfair summary of Cooper's testimony. I found Cooper's testimony far more compelling than that. Asked why he quit, Cooper testified, "It was an unhealthy and very dangerous place to work." Asked if he had any reason at the time of his resignation to believe that his Craft Casters employment would have ended prior to being recalled at KSM, Cooper answered: "Well, I kind of thought I'd probably die there. It was a dangerous place to work if that answers your question." Given the opportunity on cross examination to explain his concerns, Cooper testified:

> Well, it was a poorly ventilated, poorly lit facility. Very crude facility. There was a mind-set there about, you know, safety was not -- conditions and safety were not -- you know, were not important. . . .
>
> [T]the atmosphere in the building was always really bad. Poor ventilation like I said. It is a foundry melting metal and what not. There was electrical problems with equipment, lighting. . . .
>
> Probably one of the most glaring things was in the cafeteria. They had a small cafeteria, you know, with vending machines and tables and a refrigerator where people could put their lunches and in this refrigerator they also kept industrial chemicals. Super Glue and sometimes unmarked vessels and I just thought that was just so -- you know, so dangerous because, you know, having people access the chemicals that should be stored in a hazardous lockup. That was, you know, just a glaring example.
>
> Facility compressor had no dryer on it so it wasn't uncommon if you were to take an air hose and blow it water would come out as if it was a garden hose and, you know, it would do that until the line would purge itself and I thought that was -- that was just so dangerous. I'm surprised people haven't -- I didn't see anybody get hurt with that condition. The foundry was -- I always thought that was a particularly dangerous because they used ladles that are raised by a hoist that were -- these hoists were never maintained properly. On occasion I would have to repair stuff but they weren't interested -- they were interested in getting it repaired and not about safety factors, the condition of cables that hold ladles. Just myself having to repair it was a dangerous thing. They had no -- you know, I'm on a ladder, you know, with no help and on a high ladder. They didn't -- I would ask can somebody hold the ladder while I'm up there and, you know, they couldn't spare anybody. There was always an excuse. It was just -- yeah, it wasn't fun."

I credit Cooper's unrebutted, unchallenged testimony, and I find that his resignation was reasonable and not grounds for limiting his backpay. *Parts Depot, Inc.*, 348 NLRB 154 fn. 16 (employee not required to accept jobs posing increased exposure to environmental hazards or more onerous conditions).

Lawrence Wetzel: Lawrence Wetzel worked as a tape operator prior to the strike. His backpay period began October 5, 1997 and ran to February 8, 1999, when he declined KSM's offer of recall. During the strike Wetzel began working at Mayville Engineering. In October 1997 he left Mayville, which was beginning to lay off employees, and began working with ArcRon. In a few months he quit ArcRon and took a job with General Metalworks. Respondent does not challenge these resignations as each resulted in Wetzel earning as much or more as he had at Mayville. However, in September 1998, Wetzel left General Metalworks and took a job with the West Bend School District where he worked full time until sometime after his backpay period ended in February 1999. Wetzel took a $4-an-hour pay cut when he left General Metalworks to go to West Bend School District to work as a custodian. Wetzel offered two reasons for leaving General Motors to go with the West Bend School District. One was that West Bend was "closer to home" and the other reason was that "I was thinking about getting ready to retire." West Bend School District offered a retirement plan from the state employee retirement plan,

a plan with which Wetzel, based on prior employment as a state employee, already had retirement credits. Wetzel testified that in terms of a retirement fund or pension "I had nothing at General Metals or any of the other places." Respondent contends that Wetzel's shorter drive to work in the West Bend school does not amount to a reasonable basis for quitting his employment, but rather, constitutes a personal convenience, preference, or accommodation that Respondent should not have to pay for. Under the circumstances, I agree. It is the General Counsel's burden to demonstrate the reasonableness of Wetzel's decision to resign from General Metalwork. The record offers nothing that would establish the onerousness of the added distance to General Metalworks. The record indicates that General Metalworks was 10 miles farther than KSM (one way) for Wetzel, but indicates only that the West Bend District job was closer to his home than General Metalworks, but not how much closer. Given the geography, it could not have been much and without any record evidence demonstrating why the small added distance posed a significant problem for Wetzel, I agree that this rationale is inadequate to justify the change in jobs.

However, Wetzel's interest in finding interim employment that would allow him to accrue and ultimately obtain a pension upon retirement is not so easily dismissed. Indeed, based on the testimony, I find that this was the primary and most plausible motive for Wetzel's decision to leave General Metalworks. Respondent contends that "[q]uitting because one employer has a retirement program that is more preferable also constitutes quitting for personal preference or accommodation." I do not agree with that. Pensions are deferred compensation and Wetzel's decision then, was governed by an entirely reasonable desire to increase this important form of compensation. Respondent's concern is not with the reasonableness of Wetzel's decision, but with the attendant reduction of wages that would offset its backpay obligation to Wetzel. Wetzel's increase in pension that ultimately resulted from his move to the West Bend District job does not serve as an offset to wages owed by KSM on account of its unfair labor practices. *John T. Jones Construction, Inc.*, 349 NLRB No. 119 (2007) [not reported in Board volumes]. Whether it could serve as an offset to KSM's obligation to provide 401(k) contributions on Wetzel's behalf as a component of gross backpay obligation is a question I consider infra. But it would seem antithetical to the public policy concerns underlying the mitigation requirements to discourage discriminatees from switching interim employers in order to provide for their long time retirement needs. It is appropriate to recall that KSM's unlawful conduct was at the root of the dilemma faced by Wetzel. He was forced to consider his retirement situation without knowing when KSM intended to recall him, and without, in fact, being able to know what KSM's legal obligations for backpay and 401(k) retirement contributions would be. Wetzel cannot be faulted for taking retirement income issues into account when he made interim employment choices. I find that his decision to leave General Metalworks was based primarily on this consideration and that it was justified and reasonable, and not grounds for limiting his backpay.

Allen Curtis: Allen Curtis worked as a painter at KSM prior to the strike. His backpay period is alleged to be from February 13, 1998 to February 3, 2004. However, the General Counsel concedes that Curtis' backpay was tolled between January 15 and May 15, 2003 when Curtis attended school fulltime and was not available for employment. Curtis was employed during the strike at Tramont, and stayed there until August 1998 when he took a position with Liftco, a family owned business that sold and rented scissors, lifts, and booms. At Liftco, Curtis was paid primarily based on "piece rate," and estimated that his average earnings were between $18 and $22 per hour, significantly more than the $12 an hour he had earned at KSM. Curtis remained at Liftco until June 2000. At that time he left Liftco and took a job at Cummins. There he earned approximately $12 an hour. Curtis testified that he left Liftco because he found a painting job, the kind of work he had done at KSM and "the kind of work that I really enjoy doing," and it was closer to his home. About a year before leaving Liftco, Curtis had moved from the Milwaukee area to Harrisville, Wisconsin, to take advantage of cheaper housing and land prices there. Curtis continued to work at Liftco for a year, driving the 100 miles each way to work and back. However, Curtis denied that the distance to Liftco played a decisive role in his jobs switch: "[T]he reason I left Liftco was not because of the distance, because that didn't really play into it. But, the work that I did [at Liftco], I had to work outside a lot, and during the winter months, all my equipment would freeze on me." At KSM Curtis had worked inside painting. Curtis worked at Cummins until the facility closed and moved to Mexico in August 2002. Curtis then attended school for approximately a year for so, but left school to take a job at Phoenix Coaters during the 4th quarter of 2003. He remained employed there at the time of the hearing, many years after the closure of his backpay period.

KSM contends that Curtis incurred a willful loss of earnings when he left Liftco and took a lower paying job at Cummins. The problem with this argument is that well-compensated though it may have been, Liftco—a family owned business that sold and rented scissors lifts and booms—was a very different type of work than being a painter at KSM. Curtis left Liftco to take a painting job, work that he "loved" and like the work he performed at KSM. Under Board precedent, a discriminatee may quit an interim position for any reason if the position is not substantially equivalent to the unlawfully denied position. Here, Curtis quit to take a position that was more equivalent to the job he had at KSM. Moreover, the Liftco position, though well paid, was also more onerous, requiring work outside in the (Wisconsin) winter. This further establishes the justification for the change. *Parts Depot*, 348 NLRB at 154 fn. 16; *Lundy Packing Co.*, 286 NLRB 141, 144 (1987) ("There is no duty to remain if the interim job is substantially more onerous . . ."), enfd. 856 F.2d 627 (4th Cir. 1988); *Lord Jim's*, 277 NLRB 1514, 1516 (1986) ("There is no obligation to remain on a job that is substantially more onerous than the one from which that person was discharged").

Anthony Bannenberg: During the strike Bannenberg began working at Performance Alloys, but quit in August 1998 to work at Alto-Shaam for lesser pay than he was earning at Performance Alloys. Respondent contends that Bannenberg's decision to quit Performance Alloys and take a lower paying job at Alto-Shaam has not been shown to be justified under

applicable Board precedent. However, Bannenberg quit Performance Alloys and began working at Alto-Shaam 7 months prior to the March 1, 1999 commencement of his alleged backpay period. The General Counsel seeks no backpay for him during the time he worked at Performance Alloys (or for 7 months thereafter) and he had no damages that he was under any obligation to mitigate. Accordingly, I reject Respondent's contention.

4. Discharges from interim employment
(Brandon Hottenstein, Douglas Wiedeman, Jesus Rodriguez, Gordon Sabel)

The above-named employees were discharged from interim employers at various times during their backpay periods. Respondent advances the position that because these employees were discharged due to misconduct, their loss of earnings was willful. Respondent contends that the discharges should be treated as willful loss of income by the discriminatees and the income they would have received but for the discharge imputed to the discriminatees and used as an offset to gross backpay.

Contrary to the standard proposed by Respondent, Board precedent is clear that a discharge, without more, is not sufficient to constitute a willful loss of employment. It is the employer's burden to establish that the discriminatee "engaged in deliberate or gross misconduct" in order to show a willful loss of employment. *Pie Nationwide*, 297 NLRB 454, 454–455 (1989); *Cassis Mgtmt. Corp.*, 336 NLRB 961, 966–967 (2001) (discharge constitutes willful loss of earnings only when shown to have been caused by "deliberate and gross misconduct which is so outrageous that it suggests deliberate courting of discharge"); *Ryder System*, 302 NLRB 608, 610 (1991) ("A respondent must show deliberate or gross misconduct on the part of the discharged employee in order to establish a willful loss of employment. . . . Elmore may have missed several scheduled deliveries, but he committed no offense involving moral turpitude and his conduct was not otherwise so outrageous as to suggest deliberate courting of discharge. Without such proof, Elmore's discharge from ATS will not serve as a basis for tolling his backpay") (footnotes omitted), enfd. 983 F.2d 705 (6th Cir. 1993).[87]

With regard to each of the discriminatees at issue, there has been no showing that their discharges were the result of deliberate or gross misconduct or conduct so outrageous as to suggest a deliberate courting of discharge. Hottenstein was terminated from an interim position after 2 weeks for reporting to work late one day. Consistently showing up for work late is clearly misconduct, and is a dischargeable offense in nearly every position, but it is hardly gross or outrageous misconduct, and there is no evidence that Hottenstein's discharge, occurring because of one tardy report to work, was deliberate on his part. *Sorenson Lighted Controls*, 297 NLRB 282, 288 (1989).

Wiedeman worked at Troyk Printing from August 1999 to May 2001, when he was terminated. The employer told him it was for "misconduct." Wiedeman said it was for "bad work habits," and explained that his performance suffered because "the guy I was working with[,] I didn't get along with him too well. And then my work ability was getting worse and worse, 'cause I couldn't work with the guy. And so then I was terminated then." The cause of discharge is obviously vague, but it is Respondent's burden to establish gross, deliberate, or outrageous misconduct, and there is not a hint of it. *Ernst & Young*, 304 NLRB 178, 180 (1991) ("The issue presented is whether Bloom's conduct in either or both jobs amounted to a willful act by Bloom which resulted in her discharge from Cohen and Seidman. The Board has repeatedly held that a discharge based upon poor work performance does not constitute a willful loss of earnings"); *Barberton Plastics Products, Inc.*, 146 NLRB 393, 396 (1964) (no loss of backpay for discriminatee discharged from interim employment for unsatisfactory performance), enf't. denied on other grounds, 354 F.2d 66 (6th Cir. 1965). Wiedeman obtained employment as a security guard in early 2002 but was terminated in August 2003 for attendance problems that Wiedeman ascribed to his truck breaking down. This discharge also was not caused by gross, deliberate, or outrageous conduct.

Jesus Rodriguez began working at Milsco Manufacturing during the strike. He worked at Milsco until terminated in 1998. When in 1998 is unclear. Rodriguez agreed with the suggestion of Respondent's counsel that he worked at Milsco until the end of 1998. However, the General Counsel seeks no backpay for Rodriguez from August 1, 1998 to January 15, 1999, pleading that Rodriguez was incarcerated and unavailable for work during this period. Respondent contends that Rodriguez lost his job at Milsco as a result of his conviction and incarceration. If this is so, it is not proven in the record. Rodriguez' unrebutted testimony is that these problems postdated his termination from Milsco for absenteeism, and that after his termination from Milsco he continued working at another job until his incarceration. There is no evidence in the record regarding that job, which Rodriguez identified as Larry's Upholstery, and which may have been the second part-time job that Rodriguez said he maintained while working at Milsco. Respondent does not assert that the loss of the job at Larry's Upholstery constituted a willful loss of earnings. Respondent has not proven its claim that Rodriguez' legal problems led to his termination from Milsco for absenteeism. In any event, Respondent does not contend (nor offer any cases to support a contention) that the Board should concern itself with the underlying cause of an employee's absenteeism in evaluating whether the discharge constituted a willful loss of earnings.

[87] Respondent cites *Associated Grocers,* 295 NLRB 806 (1989) for the proposition that an employee discharged from an interim employer may be deemed to have experienced a willful loss of earnings, a proposition that is not in dispute. But this is not a standardless inquiry. The basis of the dischargeable misconduct must show a willful loss of employment, or at least a lack of concern with maintaining employment. In *Associated Grocers*, supra, the discharged employee, who had been reinstated to his primary employer (but not to a substantially equivalent position), was terminated for failure to meet production standards after repeated reprimands, a suspension, and failure to voluntarily retake a mandatory forklift certification test that he had failed. Under these circumstances, the Board imputed constructive interim earnings to the employee for the remainder of his backpay period.

As set forth, supra, a discharge for absenteeism does not constitute a willful loss of earnings. *Sorenson*, supra.[88]

After the strike, unreinstated striker Gordon Sabel took a position with Matenaer Corporation as a coil press operator. In late1998, Sabel was discharged when the company blamed him for a die that chipped and broke. Sabel testified that it was another employee that set up the machine wrong causing the die to break, but that was blamed for it because he had been told to set up the machine. Based on the evidence in the record, there is nothing gross, deliberate, or outrageous conduct about Sabel's conduct. See, e.g., *Cassis Mgmt. Corp.*, 336 at 966–967 (discharge for losing company payroll in auto accident does not constitute willful loss of earnings); *Ernst & Young*, supra. Income Sabel would have earned but for the discharge will not be used as an offset to his backpay.

5. Concealment of interim earnings (James Kollenbroich)

Respondent contends that James Kollenbroich intentionally concealed interim earnings and should be denied backpay because of it. The Board's policy is to deny gross backpay for each quarter as to which a claimant willfully concealed interim earnings. *American Navigation Co.*, 268 NLRB 426, 428–429 (1983).

As discussed, supra, after the strike, Kollenbroich was recalled to a second shift position at KSM in May. His prestrike position had been on first shift and after a couple of weeks he and Oechsner agreed that he would relinquish the second shift job but remain on the recall list. He stopped working at KSM on June 2, 1998. During cross examination, Kollenbroich testified that after he left KSM he performed "side jobs, painting and stuff like that" for "cash" until he secured employment in August 1998 with a company called Key Logo. Counsel for Respondent then asked Kollenbroich,

> [Q] [I]s there a reason that you did not report those -- the money that you made on these side jobs to the people at the Labor Board?
>
> A Well, this was cash.
>
> Q Oh, oh, yah. Okay.
>
> MR. KINNEY: I don't have any more questions.

By itself, this would be insufficient to demonstrate intentional concealment of earnings. There is no evidence that Kollenbroich was told by the Region personnel to report cash earnings to them. There is no evidence regarding the instructions on the form (if any) that he used to report interim earnings to the Region. There is no evidence that Kollenbroich knew he was supposed to report such earnings. I do not believe it can be assumed that he knew this. These questions were not asked. If that is all there was, I would be inclined to find that the allegations of intentional concealment were unproven. But I was impressed, negatively, by the change in Kollenbroich's testimony on cross examination, in which, after reconfirming his initial testimony, he claimed he had been confused and the reference to cash jobs was to work performed while on layoff prior to the strike.[89]

For the reasons set forth (in the relevant footnote) I do not credit Kollenbroich's disavowal of his initial testimony. This was an attempt to conceal interim earnings, although not a premeditated one. I sensed that Kollenbroich realized he had, to everyone's surprise, admitted earnings no one else had known about, and feeling the pressure of questioning, he tried to take it back. It may be more proof of the adage that its not the crime but the cover up that gets you, but it added an unsavory cast to the entire incident. There is ample room for debate about the best policy here: it is ironic that Kollenbroich's credited testimony is the only evidence that there was unreported income, and his uncredited testimony the only evidence of concealment. Perhaps we discourage candor by penalizing a discriminatee who has come forward to divulge interim earnings, albeit late and albeit inconsistently. But viewing the incident in its totality my considered view is that Kollenbroich attempted to intentionally conceal his cash earnings earned during the summer of 1998. It is clear that the remedy for intentional concealment of backpay is to refuse to permit the wage component of backpay in quarters where income has been intentionally concealed. *Parts Depot*, 348 NLRB at 153–154. I will deny backpay for the 2nd and 3rd quarters of 1998.[90]

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[88] I note that there is no suggestion that Rodriguez' legal problems were related to or occurred at his work. Discharges for absenteeism are common and there is usually an underlying cause, usually mundane, occasionally sordid, often debatable. Simply as a matter of practicality and efficiency, I do not believe that in a compliance specification hearing the Board would be inclined to permit litigation over the cause of absenteeism leading to a discharge. Respondent, however, was not limited in that regard here. However, Respondent failed to prove that Rodriguez' discharge from Milsco for absenteeism was attributable to anything other than "missing work."

[89] I credit Kollenbroich's testimony that he worked jobs for cash in the summer of 1998 over his ultimate disavowal of this testimony (at first, he reconfirmed it) when the General Counsel questioned him on this point during redirect examination. On brief, the General Counsel contends that Kollenbroich was an elderly witness, subject to confusion, and that he had simply become confused and admitted to side jobs that were actually performed years before, during a prior layoff from KSM. Kollenbroich appeared older than some witnesses, but younger than others, and I do not think his age played much of a role here. The hearing required witnesses to provide testimony covering periods from up to 10 years earlier and that can be difficult. But the balance of his testimony suggested to me that Kollenbroich understood the questions posed to him and did not suffer from any undue confusion. He made some mistakes on dates (as many witnesses did), but this testimony was maintained until it became apparent, based on General Counsel's redirect examination and the attendant objections and colloquy surrounding it, that he had, as Respondent aptly puts it on brief, "given up too much information." It should not be forgotten that Kollenbroich's admission came in the course of testimony specifically focusing on, discussing, and relating to his 2 week trial reinstatement at KSM. His testimony about the side jobs was also directly linked in time by Kollenbroich to the period before he began working at Key Logo. He indicated that he ceased doing the side jobs because he found the position at Key Logo. This suggests, very strongly I believe, that Kollenbroich's testimony about cash work was directed to the summer of 1998. General Counsel called Kollenbroich's wife to testify as a rebuttal witness. Even assuming, *arguendo*, that she testified accurately about all she knew, I give her often vague and halting testimony little weight. She may well have been unaware of her husband's side work during that period.

[90] Respondent contends that the interim earnings from the cash jobs cannot be attributed to specific quarters. I disagree. Kollenbroich's

6. Miscellaneous Adjustments to Backpay
(Brandon Hottenstein, Douglas Wiedeman, Lawrence Wetzel, Alan Curtis)

In their briefs, the General Counsel and/or Respondent propose further miscellaneous refinements to the compliance specification. These changes propose to alter the backpay for four employees: Hottenstein, Wiedeman, Wetzel, and Curtis. In each case the proposed change is based on inadvertent errors, or evidence or information discovered during the hearing, and thus, these matters are not reflected in the compliance specification.

Brandon Hottenstein: At the hearing, the parties learned that Hottenstein worked between 4–6 hours, 2–3 days a week, for $8 an hour as a bouncer at a nightclub, from November 1997 until the nightclub closed in February. During January 1998, Hottenstein also worked for 2 weeks at General Metalworks before being discharged. The latter income had already been accounted for in the compliance specification. Based on the new information provided by Hottenstein at the hearing, the General Counsel and Respondent stipulated that Hottenstein's backpay should include an offset for Hottenstein's wages for the period of time he worked at CB Enterprises *and* was not employed at General Metalworks. In his brief, the General Counsel proposes to reduce Hottenstein's backpay by $860 for the fourth quarter of 1997 and $660 for the first quarter of 1998.[91] On brief, Respondent acknowledges the stipulation and requests that Hottenstein's backpay be offset pursuant to the stipulation. My review of the record indicates that this change, and the General Counsel's calculations, are appropriate. My order will be adjusted accordingly.[92]

Douglas Wiedeman: On brief, the General Counsel points out that Wiedeman's testimony that he was terminated from Allied Security in August 2003 came to the General Counsel's attention at the hearing for the first time. Previously, the General Counsel believed that Wiedeman had worked at Allied Security until returning to work at KSM. Therefore, the backpay calculations for Wiedeman in the compliance specification erroneously included interim earnings offsets for the period from Wiedeman's discharge at Allied Security to his reinstatement at KSM. General Counsel contends that Wiedeman's backpay calculations should be amended to reduce the interim earnings for this period. I have, supra, rejected Respondent's contention that Wiedeman's discharge from Allied Security provides a basis to impute interim earnings. Therefore, I agree with General Counsel's point and will adjust Wiedeman's backpay accordingly. However, Respondent points out on brief that the General Counsel's backpay figures for Wiedeman plead no interim earnings for the first two quarters of 2001, notwithstanding evidence showing that Wiedeman worked at Troyk Printing from August 1999 until May 24, 2001. Respondent's point too, is well taken, and I will adjust the backpay award accordingly.[93]

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testimony was directed to asserting (and later denying) that he worked for cash between June 2, 1998 (his return to the recall list) and his acceptance of the job at Key Logo in August. He testified that he began the work "after I was laid off—I mean, on—on the recall list" and after June 2, 1998. He also testified that he was doing this, and did not need to stay at KSM on the second shift while he looked for new work because "Because I figured, well, this won't take long; I'll be called back." It is true that Kollenbroich answered the question of why he didn't need to stay at KSM while looking for new work by answering that "I had jobs, side jobs, painting and stuff like that. So I was—I was always occupied." That comment is not sufficient to provide an evidentiary basis for the suggestion that he worked on side jobs prior to April 1998. Of course it is possible. But it is rank speculation. I credit Kollenbroich's statement that the side work began after he went back to the recall list on June 2, 1998. The evidence in the record suggests that Kollenbroich had previously unreported earnings in either or both of the 2nd and 3rd quarters of 1998. I find that to be the case, but I do not find that such claims for any other period is true. Denial of gross backpay for the 2nd and 3rd quarters of 1998 reduces Kollenbroich's total backpay by $5686.01 to a total backpay of $7392.17. The reduction does not include nonwage components of gross backpay for these quarters, in this case, benefits contributions and earnings. *American Navigation Co.*, 268 NLRB at 428–429; *Alaska Pulp*, 326 NLRB at 535-536.

[91] General Counsel bases this on Hottenstein's testimony that he worked for Liquor Sweets from November 1997 to February 1998. Based on this testimony, the General Counsel assumed a total of 12.5 hours per week at $8 per hour, attributing 8.6 weeks to the fourth quarter of 1997 (November 1 to December 31, 1997) and 8.6 weeks to the first quarter of 1998 (January 1 to February 28, 1998), the General Counsel calculated interim earnings of $880 in each quarter. The General Counsel subtracted 2 weeks from the first quarter of 1998 based on Hottenstein's testimony that for 2 weeks in the first quarter of 1998 Liquor Sweets was a second job for Hottenstein (interim income has already been deducted for wages earned from his interim employment during this time at General Metalworks). Accordingly, the General Counsel seeks a reduction of net backpay for Hottenstein of $860 for the fourth quarter of 1997 and $660 for the first quarter of 1998. Hottenstein's total backpay is reduced from $12,647.75 to $11,127.75. (I note the apparent error in revised Appendix H(19)(d), attached to the General Counsel's brief, in which alleged interim straight time earnings are increased for the first quarter of 1998 by $1520 ($880 + $660) instead of just by $660 as justified by the stipulation and evidence.)

[92] I note that Respondent does not assert that Hottenstein intentionally concealed interim earnings. The evidence would not support such a claim. Respondent does request that Hottenstein's entire backpay period be eliminated based on his testimony that during the time frame he was working at the night club he was not working elsewhere during the day but instead "pretty much rested for getting ready for the next day." I reject Respondent's argument. Hottenstein testified to his efforts to seek work throughout his backpay period. Although it is vague, I think his answer to counsel's question was intended to convey that he rested during the days after working late nights and early morning as a bouncer. He did not have a duty to look for work on those particular days.

[93] Wiedeman testified that upon his discharge from Allied Security he received unemployment compensation for 6 months "[a]nd just before my unemployment ran out, I got a letter from KSM to come back." The KSM letter was dated January 28, 2004, and so the assumption is warranted that Wiedeman lost his job at Allied Security around August 1, 2003. Based on this, the General Counsel, appropriately, seeks to eliminate the interim earnings offset for Wiedeman for 2 months of the third quarter of 2003, the fourth quarter of 2003, and the first quarter of 2004 until he returned to work at KSM on February 3, 2004. This results in a change in backpay to Wiedeman from $43,418.36 to $55,687.46. As to Respondent's point, a letter from Troyk to the counsel for the General Counsel states that Wiedeman earned $9 per hour and worked 38 to 40 hours a week through May 24,

Lawrence Wetzel: At the hearing the parties stipulated that Wetzel's earnings from ArcRon should be an offset to Wetzel's gross backpay. As stipulated at the hearing, those earnings had been dropped as an offset by the compliance officer based on the erroneous assumption that Wetzel had worked there prior to the backpay period. General Counsel represents that Wetzel worked at ArcRon during the fourth quarter of 1997 and that this should be offset from Wetzel's backpay. There is no evidence to the contrary, and therefore, I accept the General Counsel's representation. I will adjust his backpay pay accordingly.[94]

Allen Curtis: Curtis was laid off from Cummins in August 2002 when the facility shut and moved to Mexico. Respondent contends (R. Br. at 94) that Curtis' backpay should be tolled from August 2002 until August 2003, based on the evidence that after he lost his job at Cummins Curtis attended school. Notably, the General Counsel pleads in the compliance specification that "[b]etween January 15 2003 and May 16, 2003 Curtis attended school full time and was unavailable for work." General Counsel does not seek backpay for that 4 month period. Curtis testified he was enrolled in school in Madison taking art classes for substantial portions of the time between these two jobs. He testified that he was enrolled in school for between a year and a year and a half. He testified that he began school soon after losing his job at Cummins in August 2002 and quit school to start work at Phoenix Coaters in December 2003, approximately 16 months later. Curtis denied that he was not seeking work during the period of time he was in school, and, testified that he quit school to take the position at Phoenix Coaters. The General Counsel, while conceding (actually, pleading) that Curtis was unavailable for work from January to May 2003, seeks backpay for the remaining months contested by Respondent. The General Counsel's position rests on the claim that Respondent bears the burden of proof of establishing that the claimant was in school full time and unavailable for work during the backpay period and failed to do so. No evidence was proffered (and no questions asked) about whether Respondent went to school full or part time, or could have worked at night, and the like. Given the record, limited as it is, I do not believe the General Counsel can rely on a lack of evidence to win this point. The record includes the affirmative pleading that Curtis was unavailable for work and going to school full time from January to May 2003. In his testimony, Curtis did not distinguish this period from the rest of the "year, year and a half" that he testified that he was in school, which he was able to undertake while receiving state unemployment benefits because his job had been lost to Mexico. This is sufficient to presumptively establish that Curtis was in school full-time for the period challenged by Respondent. Curtis' vague assertion that he looked for work during the time he was in school is contradicted, at least in part, by the General Counsel's pleadings. That he quit school in the fall of 2003 to take a job, at most, shows he was looking for work in the fall of 2003, after the August 2002 to August 2003 period for which Respondent claims tolling of backpay is appropriate. I will adjust the backpay calculations accordingly.[95]

7. Offset for interim 401(k) and retiree benefits received or available to discriminatees

KSM contends (1) that discriminatees who participated in a retirement plan at an interim employer should have their lost 401(k) benefits from KSM offset by contributions and earnings from the new plan; and (2) that where an employee had an opportunity but failed to participate in a retirement plan at an interim employer, he should not receive backpay for lost 401(k) benefits from KSM for the time that he could have been participating in the interim employer's plan.

To some extent, the General Counsel does not dispute KSM's first contention, agreeing that an employer's benefits obligation to discriminatees can be offset by "equivalent" interim benefits. *John T. Jones Construction, Inc.*, 349 NLRB No. 119, slip op. at 1 [not reported in Board volumes] ("Retirement benefits earned during interim employment that are equivalent to what would have been earned absent the discrimination are properly offset against gross retirement benefits"); *Aroostook County Regional Ophthalmology Center*, 332 NLRB at 1618.[96] Indeed, the General Counsel amended the compliance specification at trial, in part, to reduce or eliminate the claim for backpay based on "401(k) benefits or comparable retirement benefits received at interim employers" for 7 dis-

2001. As referenced, General Counsel's calculations assume no interim earnings in any quarter in 2001. Based on the letter from his interim employer, I assume 39 hours a week, for 20.8 weeks (13 weeks for the first quarter of 2001 and 7.8 weeks during the second quarter of 2001) at $9 per hour, which translates to first quarter 2001 interim earnings of $4563.00 and second quarter 2001 interim earnings of $2737.80. These earnings are fully offset from Wiedeman's gross backpay for those quarters. This decreases Wiedeman's total backpay figure by $7300.80 to a final figure of $48,386.66.

[94] General Counsel asserts on brief (GC Br. at 133) that the amount earned at ArcRon during the backpay period was $1,952.88. Accordingly, the backpay due Wetzel is reduced from $15,887.23 to $13,934.35. I note that Respondent's statement on brief (R. Br. at 107) that at the hearing "it was revealed that Mr. Wetzel failed to accurately report certain interim earnings to the Region" is, based on my evaluation of the record, untrue.

[95] Curtis testified that he lost his job in August 2002 and it "wasn't long after that" that he started going to school. Given his impressive straight time earnings for the third quarter of 2002 (almost exactly 2/3 of his first and second quarter earnings, I conclude that he worked through August 2002, and began school thereafter. I will toll gross backpay as of September 2002, which results in gross straight time backpay of $5245.27 for the third quarter of 2002 which is fully offset by interim earnings (net overtime earnings for the quarter are already zero). As a result of the tolling wage-based backpay is $0.00 for the third and fourth quarters of 2002 and the first and second quarters of 2003. For the third quarter of 2003 I assume gross straight time backpay for one month of the quarter, which would be $2627.27,with no interim earnings offset, and the same assumption is made for gross overtime, which amounts to $61.57 with no offset, for net wages in the third quarter of 2003 of $2688.84. For all periods in which backpay is tolled I do not toll the benefits component of backpay. *Alaska Pulp*, 326 NLRB at 535–536. In total, Curtis' backpay is $41,702.98.

[96] Although, it should be noted, "as a general rule" the "retirement fund contributions and pension credits earned with an interim employer are not comparable on a dollar-to-dollar basis" and therefore "are not offset by interim earnings." *Alaska Pulp*, supra at 535-536 and fn. 48.

criminatees who the Region determined to have received such benefits. See, Proposed Second Amendment to Amended Compliance Specification at ¶¶15-16. However, Respondent complains that there may be other employees for whom KSM's 401(k) plan contributions are a component of gross backpay, and no offset is pled for them.

The gravamen of Respondent's complaint is that "General Counsel failed to properly investigate retirement plan participation and availability" at interim employers and that the "initial burden" to do so falls on the General Counsel. And this, I believe, is where Respondent's argument falls off the tracks. With a few exceptions I will discuss, infra, Respondent is not arguing that specific employees received 401(k) benefits that should have been but were not offset from gross backpay. Rather, Respondent contends, without authority, that "[t]he Region has the burden of investigating whether an employee had available or participated in a retirement plan at an interim employer" and that "[h]ere, General Counsel failed to establish that the Region properly investigated whether the employees participated in a retirement plan at their interim employers . . . [and] did not investigate whether the employees had retirement plans available to them at the interim employers, but chose not to participate." Thus, according to Respondent, the General Counsel failed to meet his "initial burden . . . to investigate" interim 401(k) participation and availability.

In the first place, Respondent offers no evidence to support the claim that the Region's investigation was lacking in any qualitative way. But that is beside the point. The point is that Respondent's argument is premised on the overturning of a fundamental tenet of Board compliance precedent—that is, that the burden of proving the existence, amount, and applicability of interim offsets to gross backpay figures is borne by the respondent that committed the unfair labor practices and not by the General Counsel. *Minette Mills*, 316 NLRB at 1010, citing *Arlington Hotel Co.*, 287 NLRB at 855); *Florida Tile Co.*, 310 NLRB 609 (1993), enfd. without op. 19 F.3d 36 (11th Cir. 1994). While it is the General Counsel's voluntary policy to assist in gathering information on interim earnings and include this data in the compliance specification "the voluntary policy is nothing more than an 'administrative courtesy.'" *Minette Mills*, supra, quoting *Ryder System, Inc.*, 302 NLRB at 613 fn. 7 of ALJD (1991). "The Respondents still shouldered the burden of establishing these offsets." *Ryder System*, supra. With specific reference to retirement benefits, the Board holds that "it is a respondent's burden to show that interim benefits were equivalent in nature, and therefore appropriately offset, against those lost as a result of the discrimination." *John T. Jones Construction, Inc.*, supra. The issue is whether the Respondent has shown that the interim benefits were fungible with the gross employer's benefits. Id., slip op. at 2. *Laborers Local 158 (Worthy Bros.)*, 301 NLRB 35, 38 (1991), enfd. mem. 952 1393 (3d Cir. 1991).

Thus, contrary to the very starting point of Respondent's argument, the General Counsel carries no burden in compliance litigation to establish any facts about the interim earnings of employees or the Region's investigation of that subject. In fact, the compliance officer and the Region, by all appearances provided (and pled) significant information, to Respondent's benefit, regarding interim earnings by discriminatees. By all appearances its investigation was fully in keeping with its practice of administrative courtesy. But it is not a point that Respondent can litigate or force the General Counsel to prove.

On the evidence, KSM cannot carry its burden of demonstrating that—beyond the significant offsets set forth by the General Counsel in the compliance specification, as amended—there are additional 401(k) or other retirement-related interim earnings to be offset. Respondent points (R. Br. at 115-116) to 8 discriminatees who "[t]he Region alleges . . . are entitled to a substantial amount of backpay for lost 401(k) benefits." But KSM provides only the most limited evidence as to any of their interim earnings.

For instance, Respondent points out that discriminatee Allen Curtis testified that he participated in a 401(k) at his interim employer. However, Respondent secured, and the record reveals, absolutely no evidence about this 401(k) and Curtis' participation in it. There is, for instance, no evidence regarding the terms of the 401(k), how much Curtis invested, whether the employer provided any match for employee contributions, the nature of the investment options, or any other information, without which it is impossible to determine whether an offset is appropriate and how much that offset would be.

Respondent also asserts that it is entitled to offset a portion of Lawrence Wetzel's retirement benefits, as he testified that he left an interim employer to work at the West Bend School District because it would permit him to accrue pension credits in the state employees' pension plan. There is no evidence suggesting that, within the backpay period, Wetzel received or had the option of receiving a distribution from the state pension plan, leaving dubious the proposition that the receipt of credits for the state plan could offset the 401(k) retirement contributions owed by KSM to Wetzel as a part of gross backpay. *United Enviro Systems, Inc.*, 323 NLRB 83 (1997) (permitting offset of discriminatee's wages with a profit sharing distribution received by discriminatee from interim employer and retirement benefit distribution that discriminatee had option to receive from interim employer; but "contributions by the discriminatees' interim employers [to their pension fund] were not offset against the Respondent's gross liability to make contributions to its own funds on the employees' behalf"), enfd. 958 F.2d 364 (3d Cir. 1992). As explained in *Laborers Local 158*, supra at 38:

> Respondent argues that it may escape liability for pension fund contributions if it can show that interim benefits were "equivalent" to those lost due to discrimination. However, it is unclear that this would justify an offset, at least where the interim pension benefits come from a different employer or entity from that which provided the original benefits. As the Board has stated, "a unique benefit flows from longevity in a specific pension fund that cannot be duplicated by contributions into another pension fund." *American Navigation Co.*, 268 NLRB 426, 428-429 (1983). Thus, it is highly unlikely that any interim pension benefit would be "exactly equivalent" to that lost through discrimination. Ibid.

However, that issue need not be reached, as the factual foundation to make the argument is wholly lacking. Respondent did not adduce, and did not attempt to adduce evidence regarding Wetzel's interim pension contributions. There is no evidence about the nature of the benefit, rate of accrual, availability for distribution, or anything else other than the perception by Wetzel that his retirement would be better served if, while unlawfully not reinstated to KSM, he left General Metalworks to assume employment with an employer that contributed to the state employee pension fund. Respondent has failed to prove that its backpay obligations should be reduced based on Wetzel's interim pension benefits accrual.

Finally, Respondent asserts the related argument that its 401(k) remedy obligations to discriminatees should be offset to the extent an employee working at an interim employer had the ability but chose not to participate in an interim employer's 401(k) plan. In Respondent's view, the failure of an employee to participate in an interim employer's 401(k) constitutes a failure of the duty to mitigate damages. In advancing this argument, Respondent again contends that the Region was under a duty to investigate this matter and that the General Counsel has not met his burden to establish the adequacy of such investigation. This argument is rejected for the same reasons it was rejected with regard to Respondent's similar contention regarding the Region's investigation into actual 401(k) interim earnings. As to the legal proposition that the failure of an employee to participate in an interim employer's 401(k) is a failure to mitigate, tantamount to a willful loss of earnings, Respondent cites no case law. I am unaware of any case law considering this issue. However, it is not an issue that can be decided in Respondent's favor on this record. Respondent's "evidence" on this point is the testimony of Gordon Sabel that one of his interim employers offered an Individual Retirement Account (IRA)—which, of course, operates differently than a 401(k)—in which Sabel chose not to participate. The record tells us nothing about that plan, nothing about the potential benefits, nothing about the tax treatment of contributions, nothing about investment options, nothing about employee contribution options, nothing about the employer contribution (Sabel thought there was one). Given the dearth of information, even assuming arguendo that Respondent's legal point was accepted, the evidence would not support Respondent's claim.

[Recommended Order omitted from publication.]